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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

UNITED STATES OF AMERICA,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rule adopted by the Supreme Court in *Donaldson* v. *United States*, 400 U.S. 517 (1971), and *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), prohibiting the enforcement of administrative subpoenas to protect the role of an empaneled grand jury, is limited to summonses issued by the Internal Revenue Service or extends to subpoenas issued by the Securities and Exchange Commission ("SEC") and other administrative agencies.

2. Whether the Court of Appeals' endorsement of post-referral enforcement of an SEC subpoena and subsequent exchange of information with the Justice Department:

   a. Permits the Justice Department to conduct discovery during a grand jury investigation outside of the grand jury, contrary to a holding of the Court of Appeals for the First Circuit;

   b. Permits the SEC (and other agencies empowered to conduct their own litigation) to infringe on the role of the grand jury as a principal tool of criminal accusation, contrary to this Court's interpretation of Article II, Section 3 of the United States Constitution; and

   c. Permits the SEC and Justice Department to avoid the protections of Rule 6(e) of the Federal Rules of Criminal Procedure, contrary to holdings of the Courts of Appeals for the Third and Seventh Circuits and of the District Court for the Northern District of California.

3. Whether an agreement entered into by a federal agency, governing the procedures under which its investigation will be conducted, may be enforced against that agency.

PARTIES

In the United States Court of Appeals for the District of Columbia Circuit, the parties originally appearing before the Court of Appeals panel (the "panel") were Dresser

Industries, Inc., appellant, and the Securities and Exchange Commission, appellee.

After the panel's opinion was rendered, the United States (through the Department of Justice) was allowed to intervene. The Court of Appeals vacated the panel's opinion and ordered a rehearing en banc. The United States then participated in the rehearing.

Edward R. Luter, Vice President of Dresser, on behalf of himself and certain other Dresser employees, applied to the District Court and to the Court of Appeals to intervene in the proceeding. This application was denied by both courts.

Service of this petition has been made upon all of the above parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Dresser Industries, Inc. ("Dresser") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District Court for the District of Columbia is reproduced at Appendix C, *infra* and published at 453 F.Supp. 573 (D. D.C. 1978). The opinion of the panel of the Court of Appeals is reproduced at Appendix B, *infra*. The opinion of the Court of Appeals en banc is not yet reported. It is reproduced at Appendix A, *infra*.

JURISDICTION

A judgment was rendered by the Court of Appeals on July 16, 1980, after a rehearing en banc, which affirmed the order of the District Court. The mandate of the Court of Appeals was stayed by the Court of Appeals on August 11, 1980.

The jurisdiction of this Court to issue a writ of certiorari is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article II, Section 3 of the United States Constitution provides:

> [The President] shall . . . take Care that the Laws be faithfully executed.

Other statutes and rules involved in this case are set forth in Appendix D. They are:

15 U.S.C. § 78 u(a), (b) and (d)

26 U.S.C. § 7602

28 U.S.C. §§ 516-519

28 U.S.C. § 547

Federal Rules of Criminal Procedure, Rule 6(e)

STATEMENT OF THE CASE

The Court of Appeals below, after a rehearing en banc, vacated a prior decision of its panel (Bazelon, Sr. J., and Bryant, Dist. J., sitting by designation; Robb, J. dissenting) and affirmed the judgment and order of the District Court, enforcing an SEC administrative subpoena against Dresser. The Court of Appeals reached this decision in the face of the following facts:

> (1) The same matter under investigation by the SEC had previously been referred by the SEC to the Justice Department for criminal investigation under the same federal securities laws that govern the SEC investigation.
>
> (2) The Justice Department, after this referral, convened a grand jury, which is continuing its investigation and which has subpoenaed and received from Dresser some (but not all) of the same documents which the SEC has subpoenaed.
>
> (3) The grand jury investigation is being conducted under a specific protective order, entered by the District Court supervising the grand jury investigation, which order extends the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure ("Rule 6(e)") and includes documents as well as testimony, for the purpose of protecting certain Dresser employees and their families who live or travel abroad.
>
> (4) The documents produced to the SEC by Dresser will be transmitted by the SEC to the Justice Department attorneys conducting the grand jury investigation.
>
> (5) The Justice Department attorneys conducting the grand jury investigation will share information and enter into a "close working relationship" with the SEC attorneys conducting the civil investigation, all outside the protection of Rule 6(e) and the District Court's protective order.

(6) The SEC has represented to Dresser that there is no way that it can assure that the subpoenaed documents will not be disclosed pursuant to demands under the Freedom of Information Act, and has admitted that such demands have already been made and that a suit has been filed to obtain the documents in question. (*Dow Jones & Co., Inc.* v. *SEC*, No. 79-1238 (D.D.C., filed May 4, 1979)).

The Court of Appeals also approved enforcement of the SEC subpoena despite the fact that the SEC had failed to honor an agreement with Dresser that it would in the first instance examine Dresser's documents at Dresser's premises without taking notes revealing names of persons or countries, for the purpose of protecting certain Dresser employees and their families who live or travel abroad.

The panel opinion had allowed enforcement of the SEC subpoena, but had required the SEC to withhold "the fruits of the Commission's civil discovery . . ." in order to "maintain the integrity of the criminal discovery process." Panel slip op. at 22. The panel's opinion was based upon the applicability of this Court's decisions in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), and *Donaldson* v. *United States*, 400 U.S. 517 (1971) to the SEC.

The Court of Appeals, however, authorized the enforcement of the SEC subpoena and the transmission of the subpoenaed information to the Justice Department. In doing so, it limited the application of *LaSalle* to the IRS and construed four Supreme Court decisions in a manner diametrically contrary to the panel.[1] To Dresser's knowledge, no other court has limited the application of *LaSalle* to the IRS.

---

[1] These decisions are:

(a) *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). The panel opinion interpreted *LaSalle* as applying to the SEC (panel slip op. at 14, 21) while the en banc

The Court of Appeals proceeded to approve a "close working relationship" and the "sharing of information" between the two agencies in their respective criminal and civil investigations. En banc slip op. at 36, 38. The Court approved this sharing of information outside the protections of Rule 6(e), Fed R. Crim. P., on the basis of this Court's statement in *LaSalle* that: "[I]t is unrealistic to attempt to build a partial information barrier between the two branches of the executive." 437 U.S. at 312. All other courts that have examined this matter have construed this statement to authorize interagency cooperation only within the protection of Rule 6(e).

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[1] (Continued)

opinion held that decision to be limited to the Internal Revenue Service (en banc slip op. at 19).

(b) *Donaldson* v. *United States*, 400 U.S. 517 (1971). The en banc opinion also held *Donaldson* to be restricted to the Internal Revenue Service (en banc slip op. at 19 n. 25) while the panel opinion interpreted that decision as prohibiting the enforcement of all post-referral civil subpoenas (panel slip op. at 14 n. 30).

(c) *United States* v. *Kordel*, 397 U.S. 1 (1970). The panel opinion recognized that *Kordel* did not involve parallel criminal and civil investigations (panel slip op. at 16 n. 37) while the en banc opinion characterized that decision as sanctioning parallel criminal and civil investigations by agencies other than the Internal Revenue Service (en banc slip op. at 13, 18).

(d) *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U.S. 20 (1912). The panel opinion interpreted *Standard Sanitary* as sanctioning parallel civil and criminal enforcement proceedings but not simultaneous investigations (panel slip op. at 16 n. 37) while the en banc opinion held that that decision permitted parallel civil and criminal investigations (en banc slip op. at 11).

REASONS FOR GRANTING THE WRIT

Preliminary Statement

The Court of Appeals opinion fundamentally alters the means by which a citizen's conduct can be investigated by the executive branch of the government. All parties to this litigation have acknowledged the far reaching importance of the issues raised herein. The Court of Appeals itself noted that it vacated the panel's decision "[b]ecause of the importance of this issue [of parallel investigations and exchange of information between the SEC and the Justice Department] to enforcement of the regulatory laws of the United States . . .". En banc slip op. at 3. Moreover, the SEC general counsel has noted that the Court of Appeals decision will apply not only to the SEC but to all other agencies authorized to conduct their own litigation.[2]

The Court of Appeals decision permits what this Court sought to avoid by prohibiting the post-referral use of administrative subpoenas in *LaSalle:* "The likelihood that discovery would be broadened or the role of the grand jury infringed [by] post-referral use of the summons authority . . ." 437 U.S. at 312. The decision also allows unlimited exchange of information between civil and criminal investigative agencies during a grand jury investigation, which inevitably will result in a breach of grand jury secrecy and loss of control by the grand jury over its own investigations.

Perhaps more important, the Court of Appeals' opinion draws a distinction between the relationship of the SEC and the IRS *vis a vis* the Justice Department that has never been authorized by Congress. Moreover, even were such a distinction authorized, it would result in an unconstitutional delegation of executive branch power to the SEC.

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[2] *See* Huffman, Circuit Opens Door to Parallel Investigations in *Dresser* Ruling, *Legal Times of Washington*, July 21, 1980 at 1.

Dresser respectfully submits that the Court of Appeals' characterization of the role and functioning of the grand jury; of the protections accorded by grand jury investigations; of the relationship between these investigations and simultaneous civil investigations into the same matters; and of the Court's delegation of unlimited subpoena authority to the SEC after that agency refers a matter for criminal investigation, are appropriate subjects for review by this Court.

I.

THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINIONS IN *UNITED STATES v. LASALLE NATIONAL BANK*, 437 U.S. 298 (1978), AND *DONALDSON v. UNITED STATES*, 400 U.S. 517 (1971).

The Court of Appeals' opinion on rehearing has restricted the application of this Court's decisions in *LaSalle* and *Donaldson* to the IRS; the panel of the Court of Appeals and every lower court confronting this issue have interpreted the policy concerns of *LaSalle* and *Donaldson* to be applicable to investigations by the SEC.

In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court explained a prophylactic rule that had been propounded in *Donaldson* v. *United States*, 400 U.S. 517, 536 (1971). The *Donaldson* Court had stated that an IRS summons "may be issued in aid of an [IRS] investigation if it is issued in good faith *and prior to a recommendation for criminal prosecution.*" 400 U.S. at 536 (emphasis added). The *LaSalle* opinion, expanding upon *Donaldson*, identified two "policy interests" that preclude enforcement of a civil summons after criminal reference:

> A referral to the Justice Department permits criminal litigation to proceed. The IRS cannot try its own

> prosecutions. Such authority is reserved to the Department of Justice and, more particularly, to the United States Attorneys. 28 U.S.C. § 547(1). Nothing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation. Accord, *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36 (CA2 1978); *United States* v. *Weingarden*, 473 F.2d 454, 458-459 (CA6 1973); *United States* v. *O'Connor*, 118 F.Supp. 248, 250-251 (Mass. 1953); see *Donaldson* v. *United States*, 400 U.S. at 536; cf. *Abel* v. *United States*, 362 U.S. 217, 226 (1960). The likelihood that discovery would be broadened or the role of the grand jury infringed is substantial if post-referral use of the summons authority were permitted. 437 U.S. at 312.

Although the majority determined that a "good faith" test must be satisfied by the IRS *prior to* referral to the Justice Department, the Supreme Court was unanimous in reaffirming the *Donaldson* rule prohibiting the enforcement of a civil summons *after* criminal referral, even if issued in good faith. *See* as to the minority opinion, 437 U.S. at 320-21.

The panel of the Court of Appeals, as well as every other court that has faced the issue, has interpreted the policy concerns expressed by the Supreme Court in *LaSalle* to apply also to the *SEC*. *See* the panel slip op. at 14, 21; *SEC* v. *Fourth National Bank*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,940 (N.D. Okla. 1979); *SEC* v. *Gilbert*, 79 F.R.D. 683, 687 (S.D.N.Y. 1978); *SEC* v. *OKC Corp.*, 474 F.Supp. 1031, 1038 (N.D. Tex. 1979). *See also In re Grand Jury Subpoena* (General Dynamics Corp.), [Current] Fed. Sec. L. Rep. (CCH) ¶ 97, 562 (D. Conn. May 19, 1980).

The panel opinion (Bazelon, Sr. J.) recognized that the Justice Department may not "use the SEC's broad subpoena power to subvert the limitations of criminal dis-

covery." Panel slip op. at 18. The panel concluded, however, that the specific remedy of *LaSalle* need not be applied in this case. The panel therefore allowed both civil and criminal investigations to proceed, but prohibited the SEC from transferring to the Justice Department the fruits of the SEC's subpoena. This remedy was based upon repeated representations made to the panel by the SEC that the civil and criminal investigations were separate from each other. "In this way," concluded the panel, "we respect the need to maintain the integrity of the criminal discovery process and of the grand jury, while permitting the SEC to go forward with its responsibilities to protect the investing public." Panel slip op. at 22-23.

The same solution prescribed by the panel was found to be appropriate in protecting a grand jury investigation in the case of *SEC* v. *Fourth National Bank,* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,940, at 95,942 (N.D. Okla. 1979), based upon the SEC's similar representations of independence ("The SEC has demonstrated through affidavits that no exchange of information is occurring with respect to the criminal inquiry by the DOJ . . . .") and in *SEC* v. *Gilbert,* 79 F.R.D. 683, 687 (S.D.N.Y. 1978), in which a similar protective order was granted ("However, to prevent the possibility of abuse, the Commission is ordered not to furnish the U.S. Attorney specially with any information procured in the course of discovery in this case.").

In *SEC* v. *OKC Corp., supra,* the district court, applying the *LaSalle* doctrine, distinguished situations in which the SEC did *not* refer the matter for prosecution. Assuming that it was possible to build an information barrier between the Justice Department and a non-referring agency, the court stated:

> By prohibiting post-reference use of the agency subpoena, the [Supreme] Court recognized that it was

> promoting agency cooperation without expanding Justice's criminal discovery or infringing upon the role of [the] grand jury . . . . Only if the non-referring agency [the SEC] actively assists the Department of Justice in its investigation do the dangers of broadening Justice's discovery and infringing on the province of the grand jury arise. The cooperation that is both unavoidable and encouraged between Justice and the referring agency, however, is neither inevitable nor even expected between Justice and a nonreferring agency. The court is therefore unwilling to hold as a matter of law that a nonreferring agency's investigation, commenced independently of a criminal investigation referred by a different agency, must cease simply because of the pendency of the independent criminal investigation. 474 F. Supp. at 1038.

The Court of Appeals, however, ruled that the *LaSalle* and *Donaldson* opinions did not express a generalized concern of the Supreme Court; and that the *LaSalle* decision "is not based on principles generally applicable to parallel civil and criminal proceedings, but on limitations unique to the IRS." En banc slip op. at 19 n. 25. The Court of Appeals did recognize that the concerns expressed by this Court might well be generally applicable to all administrative agencies *after an indictment has been returned,* a matter stressed in a separate concurring opinion of Judge Edwards. En banc slip op. at 14; concurring op. at 1. Prior to an indictment, however, the Court of Appeals concluded that "the 'policy interests' of *LaSalle* have little practical significance" in the context of a subpoena enforcement action of an agency other than the IRS. En banc slip op. at 25.

The first reason for granting the writ of certiorari, therefore, is that this Court should resolve the conflict whether the concerns expressed in *LaSalle and Donaldson* for the grand jury process apply generally to civil enforcement proceedings or whether these concerns are limited to the IRS.

II.

THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS BY (A) EXPANDING THE JUSTICE DEPARTMENT'S CRIMINAL DISCOVERY POWERS; (B) PERMITTING THE SEC TO INFRINGE ON THE ROLE OF THE GRAND JURY; AND (C) ALLOWING INFORMATION TO BE EXCHANGED BETWEEN THE AGENCIES OUTSIDE THE PROTECTIONS OF RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The Court of Appeals decision would permit the SEC and the Justice Department to conduct parallel civil and criminal investigations into the same matter and freely exchange the fruits of their respective investigations even after the matter has been referred to the Justice Department and a grand jury has begun its investigation. In addition to misconstruing and misapplying this Court's opinion in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court of Appeals decision:

(a) Permits the Justice Department to conduct criminal discovery through the SEC, thereby conflicting with the decision of the Court of Appeals for the First Circuit in *In re Melvin*, 546 F.2d 1 (1st Cir. 1976), which holds that, during a grand jury investigation, the Justice Department may only conduct criminal discovery through the grand jury;

(b) Allows the SEC and other agencies empowered to conduct their own litigation to act independently of the Justice Department in a manner that must result in infringement on the role of the grand jury, thereby conflicting with the holding of this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the Executive Department must exercise ultimate control over litigation by the United States; and

(c) Sanctions an unfettered exchange of information between the agencies, thereby conflicting with the plain

language of Rule 6(e) of the Federal Rules of Criminal Procedure, as interpreted by the Courts of Appeals for the Third and Seventh Circuits and the District Court for the Northern District of California, all of which have interpreted *LaSalle* as sanctioning interagency cooperation only within the protections of Rule 6(e).

Each of these points is discussed below.

A. The Court of Appeals Decision Conflicts With The Requirement Of *In Re Melvin* That During a Grand Jury Investigation The Prosecutor Must Conduct Discovery Only Through The Grand Jury.

The Court of Appeals decision dismissed the contention that the Justice Department should solicit and obtain grand jury approval if it intends to obtain evidence through coercive discovery of another agency, concluding that:

> Obtaining the approval of the grand jury itself is not a serious impediment to Justice's efforts; indeed, the common practice is for grand jury subpoenas to be issued in blank, with the contents to be filled in by the prosecutor. *See In re Grand Jury Proceedings,* 486 F.2d 85, 87 (3d Cir. 1973). En banc slip op. at 26 n. 33.

Thus, the Court concluded that because grand jury approval is normally a formality in the issuance of a grand jury subpoena, grand jury approval is not required, and the Justice Department can, in effect, utilize the SEC's subpoena powers to obtain evidence.

Dresser is not naive regarding the relationship between prosecutor and grand jury. Dresser does not believe, however, that because the grand jury is rarely a shield between the prosecutor and the ordinary citizen, the grand jury has lost control over its own investigation *as a matter of law.* Rather, Dresser understands this Court's concern in *LaSalle,* 437 U.S. at 312, that a post-referral summons may "infringe on the role of the grand jury as a principal

tool of criminal accusation" to mean that the grand jury should not lose its power to decide whether, when, and in what manner witnesses or targets of its investigation may be subjected to coercive discovery. Similarly, the concern expressed by this Court in *LaSalle* that the Justice Department's right of criminal discovery not be broadened may only be given effect if the Justice Department is required to conduct that discovery through the grand jury rather than through an SEC subpoena.

This interpretation is buttressed by the statement of this Court in *United States* v. *Dionisio,* 410 U.S. 1, 17-18 (1973), that:

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

At least one Court of Appeals has interpreted *Dionisio* as preventing the Justice Department from obtaining evidence through coercive process other than a grand jury subpoena once a grand jury investigation has begun. In *In re Melvin,* 546 F.2d 1 (1st Cir. 1976), the prosecutor had requested and obtained a court order under Rule 17, Fed. R. Crim. P., for the purpose of forcing the defendant to appear at a police lineup. The Court of Appeals vacated the order, noting that:

> [T]he broadcast delegation of a power of this magnitude to the United States Attorney cannot be accepted if the grand jury's own role is to remain at all meaningful. *Cf. United States* v. *Dionisio, supra,* 410 U.S. at 23-24, 93 S.Ct. 764 (Douglas J., dissenting). Assuming without deciding that a directive to appear in a lineup is within the grand jury's power to issue, we

> think that the directive has to come from the grand jury itself and has to be conveyed by the grand jury to the witness in an appropriately formal fashion. Thereafter, if the witness will not comply, the court upon petition of the United States Attorney may in supplemental proceedings assist the grand jury in securing compliance. 546 F.2d at 5.

This Court should resolve this conflict and determine whether the grand jury should control (albeit with the guidance of the prosecutor) the direction, scope and pace of its own investigation, or whether that control may be avoided by the Justice Department's use of coercive powers residing in civil agencies.

B. The Court of Appeals Justified Its Decision By Attributing To The SEC Powers That The SEC Does Not And Constitutionally Cannot Have.

The Court of Appeals realized that neither the IRS nor the SEC is statutorily prohibited from issuing subpoenas in furtherance of their respective statutory mandates after referring a case to the Justice Department for criminal investigation. *Compare* 26 U.S.C. § 7602 *with* 15 U.S.C. § 78u(a), (b), (d). The Court of Appeals, however, refused to apply this Court's prophylactic rule against post-referral summons enforcement to the SEC, because it concluded that the SEC (but not the IRS) is empowered to conduct its own *enforcement* proceedings:

> [T]he *LaSalle* rule applies solely to the statutory scheme of the Internal Revenue Code, in which the IRS's civil authority ceases for all practical purposes upon referral of a taxpayer's case to Justice; it does not apply to the securities laws, in which the SEC's civil enforcement authority continues undiminished after Justice initiates a criminal investigation by the grand jury. En banc slip op. at 19.

This justification for ignoring *LaSalle,* however, raises a fundamental statutory and constitutional problem. That problem results from the fact that the authority of the SEC to enforce the laws, even though it is greater than the enforcement authority of the IRS, is subject to the overriding responsibility of the Justice Department to protect the integrity of the criminal investigatory process. The SEC, therefore, as a quasi-judicial, quasi-legislative body, cannot constitutionally separate its enforcement authority from that of the executive branch of government in order to justify infringement on the grand jury.

The Justice Department has been designated by law as the agent of the President to control all litigation, civil and criminal, in which the Attorney General determines that the United States is interested. *See* 28 U.S.C. §§ 516-519 and 28 U.S.C. § 547. (Appendix D at D3-D4). Section 518(b), in particular, reads:

> When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

In *ICC* v. *Southern Ry.,* 543 F.2d 534, 536 (5th Cir. 1976), the Fifth Circuit reaffirmed "the traditional responsibility of the Attorney General over the conduct of all litigation on behalf of the United States and its agencies." *See also The Grey Jacket,* 72 U.S. (5 Wall) 370 (1867).

There is no provision in the securities laws that negates the effect of these statutes and decisions. Thus, the Department of Justice retains supervisory control over agency litigation, even over agencies that are statutorily authorized to conduct their own court proceedings. If Justice does

retain such control, why should it not supervise *all* civil litigation whenever necessary to give effect to the "policy interests" promulgated by this Court?

Moreover, the concerns here are not solely statutory. In *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976), this Court held that "[a] lawsuit is the ultimate remedy for a breach of law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed,' [U.S. Const.] Article II, § 3." This Court has further identified the Department of Justice as "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed". *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922).

In the light of *Buckley* v. *Valeo*, any delegation of "undiminished" authority to the SEC to violate the policy interests governing the role of the grand jury would be an unconstitutional delegation of executive power to an agency outside of the control of the President. *See Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

Nevertheless, the Court of Appeals concluded that the *LaSalle* opinion's policy interests are inapplicable to the SEC:

> In the case of an SEC investigation there is no call for a "prophylatic rule", and thus no need to ponder the import of these "policy interests," because the SEC's authority to issue the subpoena remains undiminished after the start of a grand jury investigation. En banc slip op. at 25.

This Court should therefore address the issue whether the SEC (unlike the IRS) can justify trenching upon the

independence of the grand jury by reason of its statutory litigative power, when the entire litigative power of the government is vested in the executive branch.[3]

C. The Court Of Appeals Decision Is The First To Authorize An Exchange Of Information Between The Justice Department And The SEC Without Providing For The Protection Of Rule 6(e) Of The Federal Rules Of Criminal Procedure.

Rule 6(e)(2) explicitly prohibits disclosure by "attorneys for the government"[4] of "matters occurring before the grand jury" except as specifically authorized in Rules 6(e)(3)(A) and (C). Neither of these exceptions authorizes the unregulated sharing of grand jury investigatory information between the Justice Department and the SEC for the purpose of furthering the SEC's civil investigation.

Nevertheless, the Court of Appeals decision specifically authorized both the "sharing of information" and "a close working relationship" between the two agencies "when they

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[3] The power to litigate civil cases has recently become the subject of heated discussion within the executive branch and among the "independent" agencies. See "Civil War Among the Federal Agencies," *Barrister*, Fall 1978, Vol. 5, No. 4 at 8; "When the Government Goes to Court, Who Should Speak for Uncle Sam?" *National Journal*, July 5, 1980 at 1098-9.

[4] "Attorney for the government" as defined in Rule 54(c), Fed. R. Crim. P., as follows:

> "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

are investigating the same sort of offense" under the securities laws, even after a grand jury has been convened. *See generally* en banc slip op. at 34-40. If allowed to remain as law, this authorization to a prosecuting attorney conducting a grand jury investigation will inevitably result in repeated breaches of grand jury secrecy that will plague this Court and lower courts with litigation.

As authority for this unprecedented breach of grand jury secrecy, the Court of Appeals cited (1) this Court's statement in *LaSalle,* 437 U.S. at 312, that "it is unrealistic to attempt to build a partial information barrier between the two branches of the executive" and (2) the legislative history of the Foreign Corrupt Practices Act of 1977, 91 Stat. 1494. Excerpts of the legislative history are reproduced in App. D at D6-D10.[5]

When read in context, this Court's statement concerning the "partial information barrier" does not license an exchange of information outside the protections of Rule 6(e). The full statement reads as follows:

> For example, the IRS upon referral loses its ability to compromise both the criminal and the civil aspects of a fraud case. 26 USC § 7122(a). After the referral, the authority to settle rests with the Department of Justice. Interagency cooperation on the calculation of the civil liability is then to be expected and probably encourages efficient settlement of the dispute. But such cooperation, when combined with the inherently intertwined nature of the criminal and civil elements of the

[5] The Court of Appeals opinion also relied upon the Second Circuit's opinion in *United States* v. *Fields,* 592 F.2d 638, 646 (2d Cir. 1978), *cert. denied,* 442 U.S. 917 (1979). The *Fields* opinion, however, quite clearly lends no authority to the proposition that grand jury information can be shared with the SEC outside of Rule 6(e), because the Court in *Fields* dealt only with *pre-referral cooperation.*

> case, suggests that it is unrealistic to attempt to build a partial information barrier between the two branches of the executive. Effective use of information to determine civil liability would inevitably result in criminal discovery. The prophylactic restraint on the use of the summons effectively safeguards the two policy interests while encouraging maximum interagency cooperation. 437 U.S. at 312-13 (footnote omitted).

Every court other than the Court of Appeals that has had occasion to construe this passage has construed it to mean that the "interagency cooperation" between a civil agency and the Justice Department should take place within Rule 6(e). As was noted in *United States* v. *Dondich*, 460 F.Supp. 849 (N.D. Cal. 1978), after quoting the above passage from *LaSalle*:

> In cases in which the disclosure of grand jury information to civil investigators would be inappropriate, safeguards short of dismissing the indictment are available. Rule 6(e) is, after all, designed to regulate government attempts to obtain such disclosure. Protective orders against the disclosure of grand jury testimony can be issued, and, if in fact information has been improperly disclosed, it would appear more appropriate to halt the *civil* proceeding, which has improperly benefited from the grand jury investigation, than to dismiss the indictment. 460 F.Supp. at 858.

And in *In re Perlin*, 589 F.2d 260 (7th Cir. 1978), the Court of Appeals for the Seventh Circuit cited *LaSalle* as authority for the participation of Commodities Futures Trading Commission attorneys in grand jury proceedings but the Court left no doubt that it required such cooperation to take place within the confines of Rule 6(e). The Court of Appeals noted:

> [T]he history of the amendments of Rule 6(e) so clearly indicates the continuing Congressional support

> for interagency cooperation and the active participation of agency personnel, including agency attorneys, in grand jury proceedings.
>
> The purpose of the amendments to Rule 6(e) was to enable Federal agents to lend their assistance to government prosecutors .... 589 F.2d at 267.

In *United States* v. *Birdman*, 602 F.2d 547 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), the Court of Appeals referred to the policy of favoring "intergovernmental cooperation in criminal prosecutions" as follows:

> This policy is implemented in 28 U.S.C. § 515(a) and in the recent amendments to F. R. Crim. P. 6(e). The Supreme Court has recently noted the importance of such intragovernmental cooperation in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 312-13, 98 S. Ct. 2357, 57 L. Ed.2d 221 (1978). 602 F.2d at 563 (footnotes omitted).

Nor does the legislative history of the Foreign Corrupt Practices Act authorize the novel disclosure rule promulgated by the Court of Appeals. Without arguing the point at length in this petition, it will suffice to quote the panel's response to this argument:

> Indeed, the very passage cited by the SEC [from the Foreign Corrupt Practices Act] lends support to our interpretation. Cooperation between the SEC and Justice is consistent with *Kordel* [397 U.S. 1 (1970)] and *LaSalle* while the investigation is undifferentiated in its civil and criminal aspects. It is only after the civil and criminal aspects of a case diverge [i.e., after commencement of the grand jury proceedings] that it is appropriate to protect a potential criminal defendant from abuse of the civil discovery process. (panel slip op. at 20 n. 48).

This Court should clarify the *LaSalle* opinion's endorsement of "interagency cooperation" to specify whether such cooperation should take place within or outside Rule 6(e).

III.

THE SUBPOENA SHOULD NOT BE ENFORCED UNTIL THE SEC HONORS THE AGREEMENT THAT IT HAS ADMITTEDLY ENTERED INTO WITH DRESSER GOVERNING THE MEANS BY WHICH THE SEC WOULD CONDUCT ITS INVESTIGATION.

This is not a typical SEC investigation into possible wrongdoing by a corporate registrant. Rather, this dispute arose because Dresser was one of 400 companies to volunteer for what later became known as the SEC's Voluntary Disclosure Program. The Program was designed to induce disclosure of overseas corporate payments, as to which the SEC was for the first time developing a disclosure policy.[6] At a meeting between Dresser personnel and the SEC staff in January of 1976, Dresser expressed concern that disclosure of such transactions, accompanied by wide publicity abroad, could endanger both Dresser's employees stationed abroad and their families. Dresser's preliminary review had indicated that many of the transactions that Dresser might disclose in a Form 8-K had occurred in third world countries, some of which are quite hostile to the United States. Certain Dresser employees and their families are located in these countries and would be exposed to retaliation by foreign nationals should any of these transactions receive local publicity.[7] Also, many of the payments appeared to have been made as a result of extortionate demands that threat-

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[6] Response of Commissioner Loomis to Congressman Nix, August 5, 1975.

[7] J. A. p. 492 (Luter Affidavit, par. 6): "In one such country the company employees, by necessity, live in a small, self-sufficient compound, behind walls, and they and their families could be completely exposed to terrorist activities in retaliation against Dresser for any action for which Dresser might be blamed."

ened Dresser employees' lives and property overseas.[8] Dresser agreed to enter the Voluntary Disclosure Program in return for the SEC's commitment of confidentiality described below and in the Affidavit of W. Lyall Milde, reproduced as Appendix E.

The District Court, without considering the agreement that had actually been reached between Dresser and the SEC, concluded that "[t]hroughout the voluntary disclosure program the SEC reserved its rights to pursue a formal investigation and issue subpoenas if necessary. It is readily apparent that the SEC never agreed to completely forego its rights to subpoena the material in question." 453 F.Supp. at 575.

The Court of Appeals below concluded that this determination was not "clearly erroneous". En banc slip op. at 41.

Dresser has never contended that the SEC did not reserve its rights to pursue a formal investigation and issue subpoenas if necessary. Dresser does contend, however, that the SEC, in an agreement of a kind commonly entered into by lawyers of good will to facilitate a solution to difficult and potentially litigious problems, committed itself to examine Dresser's documents in the first instance without taking copies or making notes that would identify names and countries. The SEC admits that the SEC staff "agreed to conduct an initial review of such documents on the premises of Dresser's counsel, and that any notes taken at the time would not include the names of individuals or foreign coun-

[8] J. A. p. 492, (Luter Affidavit, par. 6): "On one occasion a Dresser employee was approached by a government official who solicited a bribe in connection with a review of Dresser's taxes. The Dresser employee was told by local counsel hired in the country in question that if he reported the bribe, the employee would not leave that country alive."

tries." Affidavit of Barbara N. Brandon, SEC attorney, Appendix F at F-2. A failure to determine the existence of an agreement explicitly admitted by the SEC must be clearly erroneous.

Had the SEC honored its agreement, this litigation would probably never have been necessary, because the SEC would have satisfied itself that Dresser's SEC filings were accurate and complete.

While normally this Court should not concern itself with issues of contract law, this agreement arose out of a far reaching program of the SEC to induce corporations to join with it in order to solve a problem that the SEC had never previously faced and which it found to be too large for its staff. The SEC was successful. Based on various inducements, no fewer than 400 major corporations joined the SEC's program and conducted extensive investigations into their own affairs.

Voluntary participation in government programs is fundamental to the proper functioning of government administration. Such participation must be based upon public confidence in the government, which Justice Frankfurter once characterized as a "transcending value." *Sherman* v. *United States,* 356 U.S. 369, concurring opinion at 380 (1958). This Court has demonstrated a willingness to order the enforcement of government commitments where an "essential component of the administration of justice" is involved. *See Santobello* v. *New York,* 404 U.S. 257, 260 (1971), which involved a plea bargaining agreement. The public's willingness to rely on governmental inducements to voluntary action is of no less importance to the proper functioning of government.

CONCLUSION

The net effect of the decision of the Court of Appeals, if allowed to stand, will be:

(a) To enable the use of information to determine civil liability inevitably to result in criminal discovery, thus expanding the Justice Department's right of criminal discovery and infringing on the role of the grand jury as a principal tool of criminal accusation.

(b) To enable the subpoenaed documents to be in the possession of, and examined by, both the SEC and the Justice Department outside of the secrecy provisions of Rule 6(e) and, indeed, outside of the safeguards provided by the order entered by the District Court supervising the grand jury.

(c) To enable the SEC to ignore a commitment to Dresser, upon which Dresser relied to its detriment and to the detriment of its employees and their families who live and travel overseas.

The opinion of the Court of Appeals, if allowed to stand, will result in the circumvention of the requirements of this Court in *LaSalle* and *Donaldson;* the evasion of the protections and limitations embodied in Rule 6(e); and a conflict among the Circuits regarding the means by which grand jury investigations are to be conducted. For

these reasons, we respectfully suggest that a writ of certiorari be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1702

SECURITIES AND EXCHANGE COMMISSION

v.

DRESSER INDUSTRIES, INC., APPELLANT

UNITED STATES, INTERVENOR

No. 78-1705

SECURITIES AND EXCHANGE COMMISSION

v.

DRESSER INDUSTRIES, INC.
EDWARD R. LUTER, APPELLANT

UNITED STATES, INTERVENOR

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(D.C. Miscellaneous No. 78-0141)

Argued *en banc* April 15, 1980

Decided July 16, 1980

David R. MacDonald, with whom *Francis D. Morrissey* and *Edward E. Dyson* were on the brief, for appellant Dresser Industries, Inc.

Raymond G. Larroca, *Herbert J. Miller, Jr.*, and *Thomas B. Carr* were on the supplemental memorandum for appellant Edward R. Luter.

Paul Gonson, Principal Associate General Counsel, Securities and Exchange Commission, with whom *Ralph C. Ferrara*, General Counsel, *Michael K. Wolensky*, Associate General Counsel, and *James H. Schropp* and *John P. Sweeney*, Assistant General Counsel, Securities and Exchange Commission, were on the brief, for appellee.

Irvin B. Nathan, Deputy Assistant Attorney General, with whom *Phillip B. Heymann*, Assistant Attorney General, and *Stephen G. Milliken*, Attorney, Department of Justice, were on the brief, for intervenor.

Before WRIGHT, *Chief Judge*, and MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, and EDWARDS, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Concurring statement filed by *Judge* EDWARDS.

WRIGHT, *Chief Judge*: Dresser Industries, Inc. (Dresser) appeals from a decision of the District Court[1] requiring obedience to a subpoena *duces tecum* issued by

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[1] *Reported at* 453 F.Supp. 573 (D. D.C. 1978).

the Securities and Exchange Commission (SEC) on April 21, 1978, and denying Dresser's motion to quash the subpoena.[2] The subpoena was issued in connection with an SEC investigation into Dresser's use of corporate funds to make what are euphemistically called "questionable foreign payments," and into the adequacy of Dresser's disclosures of such payments under the securities laws.

The principal issue facing this *en banc* court is whether Dresser is entitled to special protection against this SEC subpoena because of a parallel investigation into the same questionable foreign payments now being conducted by a federal grand jury under the guidance of the United States Department of Justice (Justice). Dresser argues principally that the SEC subpoena abuses the civil discovery process of the SEC for the purpose of criminal discovery and infringes the role of the grand jury in independently investigating allegations of criminal wrongdoing. On November 19, 1979 a panel of this court issued a decision affirming the District Court but, with Judge Robb dissenting, attaching a condition prohibiting the SEC from providing Justice with the information received from Dresser under this subpoena. Because of the importance of this issue to enforcement of the regulatory laws of the United States, this court voted to vacate the panel opinions and rehear the case *en banc*.

I. BACKGROUND

A. *Origin of the Investigations*

Illegal and questionable corporate payments surfaced as a major public problem in late 1973, when several major scandals implicated prominent American corpora-

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[2] In No. 78-1705 Mr. Edward R. Luter, a senior vice president of Dresser, appeals from an order denying his motion to intervene in the subpoena enforcement proceeding. *See* text at pp. 34-35 *infra*.

tions in improper use of corporate funds to influence government officials in the United States and foreign countries. The exposure of these activities disrupted public faith in the integrity of our political system and eroded international trust in the legitimacy of American corporate operations abroad.[3] SEC investigation revealed that many corporate officials were falsifying financial records to shield questionable foreign and domestic payments from exposure to the public and even, in many cases, to corporate directors and accountants. Since the completeness and accuracy of corporate financial reporting is the cornerstone of federal regulation of the securities markets, such falsification became a matter of grave concern to the SEC.[4]

Beginning in the spring of 1974 the SEC brought a series of injunctive actions against certain American corporations. It obtained consent decrees prohibiting future

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[3] The Senate Committee on Banking, Housing, and Urban Affairs reported in May 1977:

> Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars. These revelations have had severe adverse effects. Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.

S. Rep. No. 114, 95th Cong., 1st Sess. 3 (1977).

[4] The history of the SEC's involvement with questionable and illegal foreign payments is recounted briefly in *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices*, submitted to the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 2d Sess. (Comm. Print 1976), *reprinted in* CCH FEDERAL SECURITIES LAW REPORTS, No. 642 (May 19, 1976) (hereinafter cited as Report).

violations of the securities laws and establishing internal corporate procedures for investigation, disclosure, and prevention of illegal corporate payments. However, the problem of questionable foreign payments proved so widespread that the SEC devised a "Voluntary Disclosure Program" to encourage corporations to conduct investigations of their past conduct and make appropriate disclosures without direct SEC coercion.[5] Participation in the Voluntary Disclosure Program would not insulate a corporation from an SEC enforcement action, but the Commission would be less likely to exercise its discretion to initiate enforcement actions against participants.[6] The most important elements of the Voluntary Disclosure Program were (1) an independent committee of the corporation would conduct a thorough investigation into questionable foreign and domestic payments made by the corporation; (2) the committee would disclose the results of this investigation to the board of directors in full; (3) the corporation would disclose the substance of the report to the public and the SEC on Form 8-K; and (4) the corporation would issue a policy statement prohibiting future questionable and illegal payments and maintenance of false or incomplete records in connection with them.[7] Except in "egregious cases" the SEC would not require that public disclosures include specific names, dates, and places. Rather, the disclosures might be "generic" in form.[8] Thus companies participating in the Voluntary Disclosure Program would ordinarily be spared the consequences to their employees, property, and business that might result from public disclosure of specific

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[5] The Voluntary Disclosure Program is described in *id.* at 8-13.

[6] *Id.* at 8 n.7.

[7] *See id.* at 8-10.

[8] *Id.* at 32.

instances of foreign bribery or kickbacks. However, companies participating in the Voluntary Disclosure Program had to agree to grant SEC requests for access to the final report and to the unexpurgated underlying documentations.[9]

B. *The Dresser Investigations*

On January 27, 1976 an attorney and other representatives of Dresser met with members of the SEC staff to discuss a proposed filing. At the meeting Dresser agreed to conduct an internal inquiry into questionable foreign payments, in accordance with the terms of the Voluntary Disclosure Program.[10] The next day Dresser submitted a Form 8-K describing, in generic terms, one questionable foreign payment. Joint Appendix (JA) 100-102. On November 11, 1976 Dresser filed a second Form 8-K reporting the results of the internal investigation. JA 103-108. On February 10, 1977 the company supplemented this report with a third Form 8-K concerning a questionable payment not reported in the earlier reports. JA 109-113. The reports concerned Dresser's foreign activities after November 1, 1973. All disclosures were in generic, not specific, terms.

As part of its general monitoring program the SEC staff requested access to the documents underlying Dresser's report. On July 15, 1977 Dresser refused to grant such access. The company argued that allowing the staff to make notes or copies might subject its documents to public disclosure through the Freedom of Information Act.[11] Dresser stated that such disclosure could endanger

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[9] *Id.* at 9 n.8.

[10] The meeting is described by Mr. W. Lyall Milde in a deposition *reprinted in* Joint Appendix (JA) 64-66.

[11] JA 71-76.

certain of its employees working abroad.[12] During the ensuing discussions with the staff Dresser attempted to impose conditions of confidentiality upon any SEC examination of its documents, but the staff did not agree.[13] Instead, it issued a recommendation to the Commission for a formal order of investigation in the Dresser case. This recommendation was predicated on the staff's conclusions that Dresser:

1. may have used corporate funds for non-corporate purposes;
2. may have made false and misleading statements concerning the existence of and circumstances surrounding material obligations of Dresser to certain foreign governments and to other entities; and
3. may have made false entries and caused false entries to be made upon the books and records of Dresser, and its affiliates and subsidiaries with respect to, among other things, payments to foreign government officials.

JA 7-8 (order directing private investigation and designating officers to take testimony). Moreover, the staff reported that Dresser's proxy soliciting materials, reports, and statements may have been misleading with respect to the potential risks involved in its conduct of business through questionable foreign payments, and may have included false statements in connection with such payments. JA 8. Dresser vigorously opposed issuance of an order of investigation.[14]

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[12] JA 74.

[13] The staff offered to give Dresser 10 days notice before releasing any Dresser documents to the public, to enable the company to challenge such release in court. JA 12.

[14] *See* JA 77 *et seq.*

Meanwhile, the Department of Justice had established a task force on transnational payments to investigate possible criminal violations arising from illegal foreign payments. Two SEC attorneys participated in the task force. In the summer of 1977 the Justice task force requested access to SEC files on the approximately 400 companies, including Dresser, that had participated in the Voluntary Disclosure Program.[15] Pursuant to Commission authorization the SEC staff transmitted all such files to the Justice task force in August 1977.[16] After its preliminary investigation of the Form 8-K's submitted by Dresser under the Voluntary Disclosure Program, Justice presented Dresser's case to a grand jury in the District of Columbia on January 25, 1978.

Before any summons or subpoena had issued in either the SEC or the grand jury investigation, Dresser filed suit in the Southern District of Texas against the SEC and Justice to enjoin any further investigation of it by either agency.[17] While Dresser's suit was pending in the Southern District of Texas, the District of Columbia grand jury subpoenaed Dresser's documents on April 21, 1978. At roughly the same time the SEC issued a formal order of private investigation, authorizing the staff to subpoena the documents and to obtain other relevant evidence. JA 7-9 (April 11, 1978). Pursuant to that order the staff issued a subpoena *duces tecum*, returnable on May 4, 1978. JA 14-16 (April 21, 1978). This subpoena covered substantially the same documents and materials subpoenaed by the grand jury, and more. Dresser did not respond to the subpoena.[18]

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[15] JA 295-296 (statement by Marvin G. Pickholz).

[16] *Id.*

[17] *Dresser Industries, Inc. v. United States*, Civil Action No. H-78-405 (S.D. Tex.).

[18] The procedural history of this case is recounted in Dresser's motion to quash the SEC subpoena, JA 160-163.

On May 1, 1978 the District Court in Houston, Texas dismissed Dresser's suit against Justice without opinion. Three days later, after the period for compliance with its subpoena had lapsed, the SEC applied to the District Court for the District of Columbia for enforcement. In the meantime, Dresser had appealed the adverse judgment in the Texas action to the Fifth Circuit, and sought interim relief. On May 5 Judge Coleman of the Fifth Circuit enjoined further prosecution of the SEC subpoena enforcement action until after the District Court for the Southern District of Texas had ruled on Dresser's action against the SEC. Judge Coleman also obtained a stipulation from Justice that Justice would not require Dresser or its agents to appear before the grand jury until after the Company had filed a motion to quash the grand jury subpoena in the District of Columbia and had received a ruling on such motion.

On May 8, 1978 Dresser filed a motion to quash the grand jury subpoena in the District Court for the District of Columbia. On May 19 the District Court (Parker, J.) denied Dresser's motion to quash, but imposed a protective order requiring strict confidentiality in accordance with Rule 6(e) of the Federal Rules of Criminal Procedure. In imposing the protective order the court stated that the "concern of Dresser and especially its employees is not illusory and should not be lightly considered." *See* JA 163. This was in reference to Dresser's argument that public disclosures of the names, places, and dates connected with its questionable foreign payments could endanger the lives of its employees in certain turbulent foreign countries. Dresser thereafter complied with this grand jury subpoena.

On May 26, 1978 the Southern District of Texas dismissed Dresser's action against the SEC without reaching the merits. Dresser appealed to the Fifth Circuit and on June 8 obtained an order from the court that:

> Until the appeal in this case shall have been decided in this court, and except for proceedings before the Grand Jury in the District of Columbia, the Securities and Exchange Commission, its officers and employees, are enjoined to preserve inviolate the confidentiality of any information obtained by the subpoena here in issue. This order is not intended to interfere with pending proceedings in the District of Columbia to enforce the SEC subpoenas.

JA 202. On June 2, 1978 the District Court for the District of Columbia issued an order to Dresser to show cause why it should not be required to appear, give testimony, and produce records in obedience to the SEC subpoena. JA 141. On June 7 Dresser filed a motion for leave to obtain discovery from the SEC concerning the agency's alleged bad faith and attempted abuse of the judicial process, JA 27, and on June 13 filed a motion to quash the SEC subpoena. JA 160.

The District Court (Flannery, J.) denied Dresser's motion to compel discovery on June 16, without opinion. Judge Flannery explained in court that he had carefully examined the papers filed by Dresser, that discovery is rarely necessary in subpoena enforcement cases, and that he did not think this was an appropriate case for it. JA 256. Then, on June 30, 1978, the District Court (Flannery, J.) issued a memorandum opinion and order rejecting all of Dresser's objections to the SEC subpoena and requiring Dresser to comply with the subpoena within ten days after notice from the SEC. JA 301, *reported at* 453 F.Supp. 573 (D. D.C. 1978). Rehearing was denied on July 15. This appeal followed.

Meanwhile, the United States Court of Appeals for the Fifth Circuit affirmed the decisions of the District Court for the Southern District of Texas dismissing Dresser's actions against Justice and the SEC in that court, largely on ripeness grounds. *Dresser Industries,*

Inc. v. United States, 596 F.2d 1231 (5th Cir. 1979), *cert. denied*, —— U.S. ——, 48 U.S. L. WEEK 3465 (January 21, 1980). Accordingly, the interlocutory injunction requiring the SEC to preserve inviolate the confidentiality of Dresser's materials pending a decision on appeal was dissolved.

Having set forth the complicated procedural history of this case, we turn now to the principles that govern parallel administrative and criminal proceedings concerning the same conduct.

II. GENERAL PRINCIPLES

A. *Parallel Investigations*

The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous.[19] In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence. As long ago as 1912 the Supreme Court recognized that under one statutory scheme—that of the Sherman Act—a transaction or course of conduct could give rise to both criminal proceedings and civil suits. *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 52 (1912). The Court held that the government could initiate such proceedings either "simultaneously or successively," with discretion in the courts to prevent injury in particular cases. *Id.* It explained:

> The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government; the dependence

[19] *See generally* Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277 (1967).

> of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. * * *

Id.

The Supreme Court returned to this theme in *United States v. Kordel*, 397 U.S. 1 (1970). In that case the Food and Drug Administration (FDA) investigated a company and certain of its officers in connection with possible violations of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* Early in the investigation the FDA recommended and the United States Attorney filed an *in rem* action in federal district court seeking civil seizure of certain products. In connection with this suit the FDA filed extensive interrogatories with the company. Before the company had responded the FDA notified it that the agency was contemplating a criminal proceeding against it in connection with the same alleged violations of the statute. The company therefore moved to stay civil proceedings or, in the alternative, to extend the time for answering the interrogatories until after disposition of the criminal proceedings. The District Court denied this motion. Thereafter, but still before the company had filed its answers to the interrogatories, the regional and divisional offices of the FDA formally recommended criminal prosecution to the General Counsel. After it received the answers, the Department of Health, Education, and Welfare formally recommended criminal prosecution to the Justice Department. Justice obtained an indictment, and subsequently convictions. The case reached the Supreme Court upon appeal of the convictions of several of the company's officers.

The officers in *Kordel* argued that use of the civil discovery process to compel answers to interrogatories that could be used to build the government's case in a parallel criminal proceeding "reflected such unfairness and want of consideration for justice" as to require reversal. 397 U.S. at 11. The Supreme Court did not agree. The Court noted that the government had not brought the civil action "solely to obtain evidence for its criminal prosecution," *id.* at 11-12, or without notice to the defendants that it contemplated a criminal action, *id.* at 12. Moreover, the defendant was not unrepresented by counsel, *id.*, and had no reason to fear "prejudice from adverse pretrial publicity or other unfair injury," *id.* Nor were there any other "special circumstances" suggesting that the parallel proceedings were unconstitutional or improper. *Id.* In the absence of such "special circumstances" the Court recognized that prompt investigation of both civil and criminal claims can be necessary to the public interest. It said:

> The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

Id. at 11 (footnote omitted).

The Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of

criminal proceedings. *See Baxter v. Palmigiano*, 425 U.S. 308 (1976); *DeVita v. Sills*, 422 F.2d 1172, 1181 (3d Cir. 1970). Nevertheless, a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem[] to require such action, sometimes at the request of the prosecution, * * * sometimes at the request of the defense[.]" *United States v. Kordel*, *supra*, 397 U.S. at 12 n.27 (citations omitted); *see Horne Brothers, Inc. v. Laird*, 463 F.2d 1268, 1271-1272 (D.C. Cir. 1972). The court must make such determinations in the light of the particular circumstances of the case.

Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.[20] If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it. *See, e.g., United States v. Henry*, 491 F.2d 702 (6th Cir. 1974); *Texaco, Inc. v. Borda*, 383 F.2d 607, 608-609 (3d Cir. 1967); *Silver v. McCamey*, 221

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[20] In some cases the government seeks postponement of the noncriminal proceeding, to prevent the criminal defendant from broadening his rights of criminal discovery against the government. *E.g., Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

F.2d 873, 874-875 (D.C. Cir. 1955).[21] Such cases have frequently arisen in the tax field, following the leading case of *United States v. O'Connor*, 118 F.Supp. 248 (D. Mass. 1953). *Cf. Boren v. Tucker*, 239 F.2d 767, 772-773 (9th Cir. 1956) (distinguishing IRS summons enforcement before and after indictment). In some such cases, however, the courts may adequately protect the government and the private party by merely deferring civil discovery or entering an appropriate protective order. *Gordon v. FDIC*, 427 F.2d 578, 580-581 (D.C. Cir. 1970). The case at bar is a far weaker one for staying the administrative investigation. No indictment has been returned; no Fifth Amendment privilege is threatened; Rule 16(b) has not come into effect; and the SEC subpoena does not require Dresser to reveal the basis for its defense.

B. *SEC Investigations*

The case at bar concerns enforcement of the securities laws of the United States, especially the Securities Act of 1933 ('33 Act), 48 STAT. 74, 15 U.S.C. § 77a *et seq.* (1976), and the Securities Exchange Act of 1934 ('34 Act), 48 STAT. 881, 15 U.S.C. § 78a *et seq.* (1976). These statutes explicitly empower the SEC to investigate possible infractions of the securities laws with a view to

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[21] *Silver v. McCamey*, 221 F.2d 873 (D.C. Cir. 1955), held that "due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him." *Id.* at 874-875. As we have noted in text, cases decided since *Silver* have established that, as a general matter, due process is not infringed merely because an accused person is subjected, without his consent, to an administrative hearing concerning matters involved in a pending criminal proceeding. Nevertheless, as *Silver* recognized and more recent cases have affirmed, such an administrative proceeding can in some circumstances prejudice the rights of a citizen or the government. In such cases the agencies and courts may have a duty to take appropriate corrective action.

both civil and criminal enforcement, and to transmit the fruits of its investigations to Justice in the event of potential criminal proceedings. The '34 Act provides in relevant part: "The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter[.]" Section 21(a) of the '34 Act, 15 U.S.C. § 78u(a) (1976). This investigative authority includes the power to administer oaths and affirmations, subpoena witnesses, take evidence, and require production of any books, papers, correspondence, memoranda, or other records which the SEC deems relevant or material. *Id.*, Section 21(b), 15 U.S.C. § 78u(b). If it determines that a person "is engaged or is about to engage in acts or practices constituting a violation" of the Act, the SEC may bring an action in federal district court to enjoin such acts or practices. *Id.*, Section 21(d), 15 U.S.C. § 78u(d). Under the same subsection of the '34 Act the SEC may "transmit such evidence as may be available concerning such acts or practices * * * to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter." *Id.* The '33 Act is to similar effect. *See* Sections 19(b), 20(a), (b) of the '33 Act, 15 U.S.C. §§ 77s(b), 77t(a), (b) (1976).[22]

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[22] Sections 20(a) and 19(b) of the '33 Act provide the basis for the SEC's investigative authority:

> Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

[Continued]

Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously. Dissemination of false or misleading information by companies to members of the investing public may distort the efficient workings of the securities markets and injure investors who rely on the accuracy and completeness of the company's public disclosures. If the SEC suspects that a company has violated the securities laws, it must be able to respond quickly: it must be able to obtain relevant information concerning the alleged violation and to seek prompt judicial redress

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[22] [Continued]

Section 20(a) of the '33 Act, 15 U.S.C. § 77t(a) (1976).

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. * * *

Id. § 19(b), 15 U.S.C. § 77s(b). From § 20(b) derives the authority to initiate civil injunctive actions and to transmit evidence to Justice:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may[,] in its discretion, bring an action in any district court of the United States or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter. * * *

Id. § 20(b), 15 U.S.C. § 77t(b).

if necessary. Similarly, Justice must act quickly if it suspects that the laws have been broken. Grand jury investigations take time, as do criminal prosecutions. If Justice moves too slowly the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted. *See United States v. Fields*, 592 F.2d 638, 646 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). The SEC cannot always wait for Justice to complete the criminal proceedings if it is to obtain the necessary prompt civil remedy; neither can Justice always await the conclusion of the civil proceeding without endangering its criminal case. Thus we should not block parallel investigations by these agencies in the absence of "special circumstances" in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government. *See United States v. Kordel*, *supra*, 397 U.S. at 11-13.

III. Applicability of *United States v. LaSalle Nat'l Bank*

Dresser principally relies on an analogy to *United States v. LaSalle Nat'l Bank*, 437 U.S. 297 (1978),[23] in which the Supreme Court said in dictum that the Internal Revenue Service (IRS) may not use its summons authority to investigate possible violations of the tax laws after it has referred those violations to Justice for criminal prosecution. *See id.* at 311-313.[24] Dresser argues that

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[23] Dresser's other arguments, in summary, are (1) that the SEC subpoena breached an enforceable agreement of confidentiality with Dresser; (2) Dresser was erroneously denied certain discovery rights; and (3) enforcement of the subpoena might violate Dresser's attorney-client privilege. *See* brief of respondent-appellant at 11-12. These arguments are discussed in Part V *infra*.

[24] This portion of *LaSalle* is properly characterized as dictum, because the controversy concerned investigation of a

the SEC's transmittal of Dresser's file to Justice was equivalent to a "referral" under *LaSalle*, and thus that the SEC's power to enforce investigative subpoenas against Dresser in connection with that file lapsed at that time. Alternatively, Dresser suggests that, even if transmittal of the file was not analogous to a "referral" under *LaSalle*, initiation of the grand jury investigation precluded subsequent enforcement of SEC investigative subpoenas into the same matters.

These two alternatives are vulnerable to the same objection: the *LaSalle* rule applies solely to the statutory scheme of the Internal Revenue Code, in which the IRS's civil authority ceases for all practical purposes upon referral of a taxpayer's case to Justice; it does not apply to the securities laws, in which the SEC's civil enforcement authority continues undiminished after Justice initiates a criminal investigation by the grand jury.[25]

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taxpayer *prior* to referral to Justice. The Court held that a taxpayer challenging an IRS summons prior to such referral bears the heavy burden of showing that the summons was issued in "bad faith," 437 U.S. at 316, which the Court interpreted as being "solely [for] criminal purposes." *Id.* The Supreme Court has never decided a case concerning an IRS summons issued after referral to Justice but before indictment. *See* note 25 *infra*.

[25] The *LaSalle* rule—prohibiting enforcement of an IRS summons after the IRS had referred the case to Justice for criminal prosecution—derives from *Donaldson v. United States*, 400 U.S. 517 (1971). In *Donaldson* the Court said:

> We hold that under § 7602 [of the Internal Revenue Code, 26 U.S.C. § 7602 (1970)] an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Id. at 536. The *Donaldson* Court recognized that under prior precedent the limitation on the IRS summons authority came into effect only in "the situation of a *pending criminal charge*

The IRS summons authority derives from Section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1976). Its authority is restricted to the terms and purposes of that provision. The Supreme Court said in *LaSalle*:

> In § 7602 Congress has bestowed upon the Service the authority to summon production for four purposes only: for "ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability." Congress therefore intended the summons authority to be used to aid the determination and col-

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or, at most, of an investigation solely for criminal purposes." *Id.* at 533 (emphasis added). *See Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (*citing Boren v. Tucker*, 239 F.2d 767, 772-773 (9th Cir. 1956)). "Any other holding," according to the *Donaldson* Court, "would thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary or his delegate.'" 400 U.S. at 533. Nevertheless, after a detailed discussion of the enforcement scheme of the Internal Revenue Code, the Court reiterated the rule in modified form: instead of prohibiting enforcement of an IRS summons if there is a *pending criminal charge*, the Court prohibited such enforcement if there had been a *referral to Justice for criminal prosecution. Compare* 400 U.S. at 533 *with id.* at 536. Obviously, the difference between these two formulations is substantial. The Court did not explicitly state why it shifted from the one to the other, but the best available explanation lies in its discussion of the statutory scheme, which appears between the two conflicting statements of the rule. In *LaSalle* Justice Blackmun, who also wrote the opinion for the Court in *Donaldson*, explained that the decision in *Donaldson* was not predicated on its analysis of precedent. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 307 (1978). Rather, the decision relied on its review of the statutory scheme. *Id.* "The validity of the summonses depended ultimately on whether they were among those authorized by Congress," the Justice said. *Id.* This emphasizes that the rule espoused in *LaSalle* and *Donaldson* is not based on principles generally applicable to parallel civil and criminal proceedings, but on limitations unique to the IRS.

> lection of taxes. These purposes do not include the goal of filing criminal charges against citizens. * * *.

United States v. LaSalle Nat'l Bank, supra, 437 U.S. at 316-317 n.18 (first ellipsis in original).

In the pre-referral stage of an IRS investigation the civil and criminal elements of the investigation are intertwined. *Id.* at 308-311. The same information is useful in negotiating with the taxpayer, in suing in court for additional taxes, or in deciding whether to recommend criminal prosecution. Thus the IRS at that stage is empowered to issue investigative summonses under Section 7602, even though the fruits of such summonses may be useful for the illegitimate purpose of "filing criminal charges against citizens" as well as the legitimate purposes of determining and collecting taxes.

However, upon referral of the case to Justice with a recommendation for criminal prosecution, "the criminal and civil aspects of a tax fraud case begin to diverge." *Id.* at 311. After that point the IRS loses its ability to compromise the case, either criminally or civilly. All such authority devolves upon Justice. *Id.* at 312. Although theoretically the IRS might use its summons power during the pendency of the criminal proceeding to discover information for the purpose of a future civil tax suit, *id.* at 311-312, in practice the IRS holds all civil action in abeyance until the criminal proceeding is completed.[26] Only then does the IRS turn its attention again to the civil aspects of the case.

Thus, in the *LaSalle* Court's view, the authorized purposes for summonses under Section 7602 cease as a practical matter during the pendency of the criminal proceed-

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[26] *See* POLICIES OF THE IRS HANDBOOK. P-4-84, *reprinted in* 1 CCH INTERNAL REVENUE MANUAL 1305-1310 (1978); Office of the Chief Counsel, IRS, Civil Considerations in Pending Criminal Matters, Order No. 3050.1 (March 23, 1978).

ing. Because of this the Court was willing to impose a "prophylactic" rule flatly forbidding *any* use of the Section 7602 authority once a case has been referred to Justice for criminal prosecution. *Id.* at 312. This rule restricts the IRS within the confines of its statutory authority and also "safeguards * * * two policy interests," *id.* at 313. These interests are to avoid broadening the Justice Department's right of criminal litigation discovery and to avoid infringing on the role of the grand jury as a principal tool of criminal accusation. *Id.* at 312.

Dresser asks this court to extend the reasoning of *LaSalle* to govern the conduct of the SEC under the securities laws. But IRS investigative and enforcement proceedings are not analogous to those of the SEC. The language of the securities laws and the nature of the SEC's civil enforcement responsibilities require that the SEC retain full powers of investigation and civil enforcement action, even after Justice has begun a criminal investigation into the same alleged violations.

The investigative provisions of the securities laws are far broader than Section 7602 of the Internal Revenue Code, as interpreted in *LaSalle. See SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1022-1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). SEC investigations are not confined to "four purposes only." *Cf. United States v. LaSalle Nat'l Bank, supra*, 437 U.S. at 316 n.18. Rather, the SEC may, "*in its discretion*, make such investigations as *it deems necessary* to determine whether any person has violated, is violating, or is about to violate any provision" of the '34 Act, Section 21(a) of the '34 Act, 15 U.S.C. § 78u(a) (1976) (emphasis added). Moreover, the SEC is "authorized *in its discretion* * * * to investigate *any* facts, conditions, practices, or matters which *it may deem necessary or proper* to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing in-

formation to serve as a basis for recommending further legislation concerning matters to which this chapter relates." *Id.* (emphasis added). *See also* Section 19(b) of the '33 Act, 15 U.S.C. § 77s(b) (1976). Given this broad statutory mandate, there is virtually no possibility that in issuing this subpoena the SEC was acting *ultra vires*. The investigation of Dresser—based as it was on the staff's conclusion that Dresser may have engaged in conduct seriously contravening the securities laws[27]—falls squarely within the Commission's explicit investigatory authority.[28] Unlike the Internal Revenue Code as interpreted in *LaSalle*, the securities laws offer no suggestion that the scope of the SEC's investigative authority shrinks when a grand jury begins to investigate the same matters. Since the validity of summonses or subpoenas "depend[s] ultimately on whether they were among those authorized by Congress," *United States v. LaSalle Nat'l Bank, supra*, 437 U.S. at 307, we conclude that this subpoena is enforceable under the rule of that case.[29]

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[27] *See* text at note 14 *supra*.

[28] Dresser argued unsuccessfully in the District Court that the SEC had exceeded its authority by issuing the subpoena where there was no likelihood that a violation had been or was about to be committed. 453 F.Supp. at 575. On appeal Dresser makes this argument only obliquely in the form of an objection to the denial of discovery. Brief of respondent-appellant at 39-42. In any event, the argument is without merit. Our task is merely to ensure that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (*quoting United States v. Morton Salt Co.*, 338 U.S. 632, 652-653 (1950)); *see also SEC v. Howatt*, 525 F.2d 226, 229 (1st Cir. 1975). We agree with the District Court that "[t]his investigation has a legitimate purpose and the inquiry is relevant to that purpose." 453 F.Supp. at 576.

[29] *Cf. SEC v. OKC Corp.*, 474 F.Supp. 1031, 1038 (N.D. Tex. 1979) (SEC subpoena enforced although Department of

Fulfillment of the SEC's civil enforcement responsibilities requires this conclusion. Unlike the IRS, which can postpone collection of taxes for the duration of parallel criminal proceedings without seriously injuring the public, the SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to investigate possible securities infractions and undertake civil enforcement actions even after Justice has begun a criminal investigation. For the SEC to stay its hand might well defeat its purpose.

Dresser attempts to prevent enforcement of this subpoena by invoking the "policy interests" identified by the *LaSalle* Court: to avoid broadening Justice's right of criminal litigation discovery and to avoid infringing the role of the grand jury as a principal tool of criminal accusation. Brief of respondent-appellant at 21-23; supplemental brief of appellant Dresser Industries, Inc. at 10-21; *see United States v. LaSalle Nat'l Bank, supra*, 437 U.S. at 312. We reject this argument for two reasons.

First, Dresser disregards the context in which these "policy interests" arose in *LaSalle*. Only after the Court had determined that the IRS had no practical authorized purpose for issuing a summons after referral of a case to Justice did it direct its attention to these "policy interests." Then it did so solely to explain its imposition of a "prophylactic" rule forbidding *any use* of the IRS summons authority after referral to Justice, as opposed to forbidding only such uses as are unrelated to the purposes of Section 7602.[30] The Court did not impose such

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Energy had made criminal reference to Justice in related matter).

[30] *See United States v. LaSalle Nat'l Bank, supra* note 25, 437 U.S. at 311-312:

a "prophylactic" rule in any situation where it would significantly restrict the legitimate investigative authority of the IRS.[31] In the case of an SEC investigation there is no call for a "prophylactic rule," and thus no need to ponder the import of these "policy interests," because the SEC's authority to issue the subpoena remains undiminished after the start of a grand jury investigation.

Second, the "policy interests" of *LaSalle* have little practical significance in this context. The first—to avoid broadening Justice's right to criminal discovery—is

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We recognize, of course, that even upon recommendation to the Justice Department, the civil and criminal elements do not separate completely. The Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins. Logically, then, the IRS could use its summons authority under § 7602 to uncover information about the tax liability created by a fraud regardless of the status of the criminal case. But the rule forbidding such is a prophylactic intended to safeguard the following policy interests.

[31] The *LaSalle* Court underscored, in a footnote, its belief that a "prophylactic" rule need not be imposed in every circumstance presenting the potentiality for infringement of the grand jury's role or broadening of Justice's right to criminal discovery. The Court disapproved the position adopted by the Third Circuit in *United States v. Lafko*, 520 F.2d 622, 625 (3d Cir. 1975), which it characterized as holding that the IRS summons authority must cease at the point when the special agent recommends prosecution to the district office, rather than at the point when the IRS recommends prosecution to Justice. 437 U.S. at 313 n.15. The Supreme Court admitted that "the potential for expanding the criminal discovery rights of the Justice Department or for usurping the role of the grand jury exists at the point of the recommendation by the special agent." *Id.* But it called the possibilities of abuse "remote," *id.*, and stated that they "do not justify imposing an absolute ban on the use of the summons before that point." *Id.*

flatly inapplicable, as Dresser admits.[32] The strict limitations on discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17, do not take effect until after a grand jury has returned an indictment. Until then there is no danger that Justice might broaden its discovery rights, because the subpoena power of the grand jury is as broad as—perhaps broader than—that of the SEC. Justice can procure from Dresser directly whatever materials it might procure indirectly through the SEC.[33] In fact, a party investigated under SEC rules instead of grand jury procedures is accorded far greater procedural protection, and has no cause to complain. *See* 17 C.F.R. §§ 203.6-203.7 (1979).[34]

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[32] Supplemental brief of appellant Dresser Industries, Inc. at 19 n.16.

[33] *See Developments in the Law—Corporate Crime: Regulating Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1312-1313 (1979). Obtaining the approval of the grand jury itself is not a serious impediment to Justice's efforts; indeed, the common practice is for grand jury subpoenas to be issued in blank, with the contents to be filled in by the prosecutor. *See In re Grand Jury Proceedings*, 486 F.2d 85, 87 (3d Cir. 1973).

[34] 17 C.F.R. §§ 203.6-203.7 (1979) provide in relevant part:

§ 203.6 Transcripts.

* * * A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however*, That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

§ 203.7 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or testimony at a formal

In its brief Dresser has concentrated upon the second "policy interest" identified in *LaSalle*: avoiding infringement upon the role of the grand jury. Dresser suggests two ways in which the SEC civil investigation might infringe the role of the grand jury. First, it argues that enforcement of the SEC subpoena would undermine the secrecy protections of the grand jury because the SEC subpoena covers many or all of the Dresser documents that have already been subpoenaed by the grand jury.[35] In this argument Dresser misconceives the nature of the secrecy protections of the grand jury.

Federal Rule of Criminal Procedure 6(e) provides in relevant part:

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investigative proceeding shall upon request be shown the Commission's order of investigation. * * *

(b) Any person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel * * *.

(c) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any formal investigative proceeding and to have this attorney (1) advise such person before, during and after the conclusion of such examination, (2) question such person briefly at the conclusion of the examination to clarify any of the answers such person has given, and (3) make summary notes during such examination solely for the use of such person.

(d) Unless otherwise ordered by the Commission, in any public formal investigative proceeding, if the record shall contain implications of wrongdoing by any person, such person shall have the right to appear on the record; and in addition to the rights afforded other witnesses hereby, he shall have a reasonable opportunity of cross-examination and production of rebuttal testimony or documentary evidence. * * *

[35] Supplemental brief of appellant Dresser Industries, Inc. at 13-17.

(e) Secrecy of Proceedings and Disclosure

(1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. * * *

We note that the Rule prohibits disclosure of "matters occurring before the grand jury[.]" This serves to protect the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like. It does not require, however, that a veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury.[36] It is well established that

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[36] The rationales for grand jury secrecy are well established:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10 (1979) (brackets in original) (*quoting United States v. Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954), *approved in*

> when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. * * *

United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).[37] Dresser's documents at issue

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United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958)). *See also* Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162, 166 (1975) (suggesting a further rationale: "to prevent the grand jury from being diverted from its primary concern—the investigation of criminal activity"). None of these rationales has any application to an independent agency subpoena of corporate documents. No witnesses or targets will be frightened from testifying fully, no grand jurors will be threatened or suborned, no target will be embarrassed—any more than it might be embarrassed by any other SEC subpoena. Since the fact that Dresser is the target of a grand jury investigation is already public knowledge—as witness this case—there is no danger of exposing the identity of an innocent grand jury target.

[37] *Accord, United States v. Stanford*, 589 F.2d 285, 290-291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979); *In re Search Warrant for Second Floor Bedroom*, —— F.Supp. —— (D. R.I. No. 80-0018M-01, slip op. issued May 9, 1980), *In re Grand Jury Investigation of Ven-Fuel*, 441 F.Supp. 1299, 1302-1303 (M.D. Fla. 1977); *Brink v. DaLesio*, 82 F.R.D. 664, 668-669 (D. Md. 1979); *Michelin Tire Corp. v. United States*, 453 F.Supp. 897, 898 (Cust. Ct. 1978); *see also In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 217 (5th Cir. 1980); *State of Illinois v. Sarbaugh*, 552 F.2d 768, 771-772 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977). Some courts have adopted a broad interpretation of "matters occurring before the grand jury" as documents that "may tend to reveal what transpired before the grand jury." *United States v. Armco Steel Corp.*, 458 F.Supp. 784, 790 (W.D. Mo. 1978);

here were created for an independent corporate purpose, not directly related to the prospect of a grand jury investigation. The SEC has subpoenaed them directly from Dresser, without mention of the grand jury. They do not reveal what has occurred before the grand jury; they reveal only what has occurred in Dresser's foreign operations. *See United States v. Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). The fact that a grand jury has subpoenaed documents concerning a particular matter does not insulate that matter from investigation in another forum.[38] In fact, if the grand jury proceedings are genuinely secret, other agencies and courts will not know the subject matter of the grand jury investigation and thus will not be able to determine whether their own inquiry would overlap that of the grand jury.

In this case Dresser is obligated under the securities laws to provide documents to the SEC in obedience to a lawful subpoena. The existence of a grand jury proceeding neither adds to nor detracts from Dresser's rights before the SEC. Whatever rights to secrecy or confidentiality Dresser may have are the product solely of the laws governing the SEC; they are unaffected by the parallel grand jury proceeding.

The second way in which Dresser argues that enforcement of this subpoena might infringe the role of the

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accord, In re Grand Jury Investigation (Lance), supra, 610 F.2d at 216. Even under this test courts should permit disclosure of documents in the hands of private parties, independently identified and sought for a lawful and independent purpose.

[38] We recognize that in some circumstances the courts have protected materials not technically within the range of Rule 6(e) where disclosure would jeopardize the effective functioning of the grand jury. *See In re Search Warrant for Second Floor Bedroom, supra* note 37, —— F.Supp. at ——. This case presents no such problem.

grand jury is that the SEC could interpret and selectively disclose parts of the subpoenaed information to the grand jury through Justice, thereby undermining the independence of the grand jury's inquiry.[39] Of course, this argument is purely speculative since, as Dresser is well aware,[40] the SEC's general policy is to grant Justice continuing access to the entirety of a given investigative file once the Commission formally grants access.[41] As of now the SEC has not received any confidential documents from Dresser, and thus we have had no opportunity to see how this policy operates in practice. It would be altogether inappropriate for this court to presume that the SEC will pre-select documents for release to Justice in order to prejudice the grand jury.

In another sense Dresser's complaint on this score has little practical significance. No one would suggest that the grand jurors, unassisted by accountants, lawyers, or others schooled in the arcana of corporate financial accounting, could sift through the masses of Dresser's corporate documents and arrive at a coherent picture of the company's foreign payments and disclosure practices. In this area, as in many areas of great complexity, the grand jurors are assisted—guided and influenced, in fact —not only by the United States Attorneys assigned to the investigation, but also by experts provided by the federal regulatory agencies with experience in the particular subject areas. This expert assistance is permitted under Rule 6(e), and it promotes the efficiency and rationality of the criminal investigative process. *See In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *Robert Hawthorne*,

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[39] Supplemental brief of appellant Dresser Industries, Inc. at 17-18.

[40] *See id.* at 5 n.10.

[41] *See* letter from James H. Schropp to this court dated April 3, 1979.

Inc. v. Director of IRS, 406 F.Supp. 1098, 1106-1107 (E.D. Pa. 1975); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1314-1315 (1979). In this case two SEC agents have been assigned to Justice's task force on transnational payments to assist in the investigation of companies possibly involved in illegal foreign payments.[42] There can be little doubt that the grand jury's deliberations will be influenced by the work of these SEC agents. Any additional influence that might arise as a result of enforcement of the SEC subpoena and transmittal of documents to Justice thereafter is likely to be inconsequential.[43]

Finally, we note that if Dresser is genuinely worried that the SEC might disclose only those documents prejudicial to the company, it may provide the grand jury with copies of *all* the documents it provides to the SEC, thereby obviating the danger. Alternatively, if Dresser obtains evidence that the SEC is in fact abusing its power to transmit documents to Justice, and is thereby distorting the grand jury's perception of the case, Dresser may apply to the courts at that time for appropriate relief.

We conclude that the danger that enforcement of this subpoena might infringe the role of the grand jury is too speculative and remote at this point to justify so extreme an action as denying enforcement of this subpoena.[44]

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[42] *See* text following note 14 *supra*.

[43] Dresser implicitly admits that it would be proper for the SEC to conduct and complete a civil investigation, and then to transmit all relevant materials to Justice for possible criminal prosecution. *See* supplemental brief of appellant Dresser Industries, Inc. at 22-24. Yet such a procedure would create as severe a problem of grand jury infringement as the procedure complained of in this case.

[44] Dresser seeks to minimize the effect an order denying enforcement of this subpoena would have on the SEC's ability

In essence, Dresser has launched this attack on the parallel SEC and Justice proceedings in order to obtain protection against the bare SEC proceeding, which it fears will result in public disclosure of sensitive corporate documents. The prejudice Dresser claims it will suffer from the parallel nature of the proceedings is speculative and undefined—if indeed Dresser would suffer any prejudice from it at all.[45] Any entitlement to confi-

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to carry out its mandate by suggesting that the SEC could continue its civil enforcement efforts through obtaining access to the grand jury materials under Rule 6(e)(2)(C)(i), which permits disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding[.]" This disregards the fact that some courts have held that the SEC must demonstrate a "particularized need" for grand jury materials in order to obtain access to them, *e.g.*, *In re Grand Jury Investigation*, 414 F.Supp. 74, 76 (S.D. N.Y. 1976), and that administrative investigative proceedings may not be considered preliminary to or in connection with a judicial proceeding for purposes of the Rule. *See United States v. Bates*, —— F.2d —— (D.C. Cir. No. 79-1930, decided April 18, 1980) (*per curiam*) (concerning a Federal Maritime Commission investigation).

[45] During oral argument before the panel Dresser's attorney was asked what prejudice the company suffered from the parallel proceedings. Transcript of oral argument at 49 (Dec. 11, 1978). He responded that Dresser was prejudiced in two ways. First, he complained that "the SEC does not have anywhere near the confidentiality protection that Rule 6(e) provides." Of course, this complaint is properly addressed to Congress, which explicitly granted the SEC the power to "publish" the results of its investigations. Section 21(a) of the '34 Act, 15 U.S.C. § 78u(a) (1976). We do not express any opinion on whether the SEC would be justified in exercising the power to publish in this case; we merely note that the Commission is not governed, and is not intended to be governed, by Rule 6(e). Second, the attorney invoked Dresser's "right to a fair criminal investigation, including the fact that the Rules of Discovery of the Federal Rules of Criminal Procedure apply to it." Transcript of oral argument at 49 (Dec. 11, 1978). If he was referring to Rule 16(b),

dential treatment of its documents must arise under the laws pertaining to the SEC; the fortuity of a parallel grand jury investigation cannot expand Dresser's rights in this SEC enforcement action. Thus Dresser's invocation of *LaSalle* can avail the company nothing.

IV. Cooperation Between SEC and Justice

In its initial decision in this case a panel of this court ruled that "the broad prophylactic rule enunciated in *LaSalle* is inappropriate where the SEC and the Justice Department are simultaneously pursuing civil and criminal investigations." Slip opinion at 18. The panel therefore affirmed the District Court and ordered enforcement of the SEC subpoena. Out of a concern that the SEC subpoena might somehow "subvert the limitations of criminal discovery," *id.*, however, the panel, with one judge dissenting, modified the terms of the subpoena enforcement order. It required that "once the Justice Department initiates criminal proceedings by means of a grand jury, the SEC may not provide the Justice Department with the fruits of the Commission's civil discovery gathered after the decision to prosecute." *Id.* at 22.[46] We affirm the judgment of the District Court and reject the panel's modification.

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then he was mistaken, for Rule 16(b) comes into play only after indictment. In fact, the grand jury's investigative powers are as broad as or broader than those of the SEC. Dresser cannot claim to be prejudiced by the breadth of the SEC investigative authority.

[46] Under the panel's terminology the decision to prosecute and the beginning of "criminal discovery" occur at the time when Justice begins to present its case to the grand jury. *See* slip op. at 21. After indictment by the grand jury, when genuine criminal discovery under Rule 16(b) begins, different considerations would govern. *See* text and notes at notes 20-21 *supra*; supplemental brief of the SEC at 23-24; supplemental brief of appellant Dresser Industries, Inc. at 9 n.16.

First, we note that no party to this case had suggested or requested a modification such as that imposed by the panel majority, either in the District Court or in this court.[47] In supplemental briefs submitted to the *en banc* court both the SEC and Justice vigorously oppose the modification, while Dresser's support for it is lukewarm at most. Dresser had argued that the SEC investigation is flatly prohibited by the rule of *LaSalle*; the panel's modification, according to Dresser, "may have had a similar effect" to that of *LaSalle*—"though not as assured in its operation." Supplemental brief of appellant Dresser Industries, Inc. at 30. Dresser characterized the panel's decision to "relax" the *LaSalle* rule as "unsound," *id.* at 29, and described the motivating factor in the panel's decision—the supposed need to protect the "criminal discovery process * * * of the grand jury," slip opinion at 22—as "irrelevant to this litigation." Supplemental brief of appellant Dresser Industries, Inc. at 9 n.16. The reactions of the parties, therefore, suggest that the panel's modification might serve more to impede securities law enforcement than to protect the interests of Dresser.

Second, we note that there is no support for the panel's modification in either the relevant statutes or legislative history. Both the '33 Act and the '34 Act—and other statutes related to securities law enforcement as well[48]—expressly authorize the SEC to "transmit such evidence as may be available * * * to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this subchapter." Section 20(b) of the

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[47] Mr. Luter, appellant in No. 78-1705, has taken no position regarding the panel's modification of the District Court's order.

[48] Investment Company Act of 1940, § 42(e), 15 U.S.C. § 80a-41(e) (1976); Investment Company Act of 1940, § 209(e), 15 U.S.C. § 80b-9(e) (1976); Public Utility Holding Company Act of 1935, § 18(f), 15 U.S.C. § 79r(f) (1976).

'33 Act, 15 U.S.C. § 77t(b) (1976); Section 21(d) of the '34 Act, 15 U.S.C. § 78u(d) (1976). The statutes impose no limitation on when this transmittal may occur. The parties have not cited any portions of the legislative histories of these Acts relevant to this question, nor have we found any. But the SEC and Justice find considerable support for their interpretation in the legislative history of the Foreign Corrupt Practices Act of 1977, 91 STAT. 1494, Title I, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977).

The Foreign Corrupt Practices Act outlaws corporate bribery of foreign officials and associated inaccurate or misleading financial recordkeeping. In passing the statute Congress recognized the role of the SEC in combatting such practices under the '33 and '34 Acts, and sought to "strengthen the Commission's ability to enforce compliance with the existing reguirements [*sic*] of the securities laws[.]" S. Rep. No. 114, 95th Cong., 1st Sess. 12 (1977). Both the Senate and the House reports on the bill acknowledged the SEC's dual investigative role in preparing cases for civil and criminal enforcement actions. They also recognize the necessity of close cooperation between the SEC and Justice in preparing such cases. The Senate Committee said:

> The committee expects that close cooperation will develop between the SEC and the Justice Department at the earliest stage of any investigation in order to insure that the evidence needed for a criminal proscution does not become stale. * * *

Id. at 12. It stated that it expected the SEC and Justice to "work out" between themselves certain "arrangements * * * on criminal matters" that would preserve the authority of each within its jurisdiction. *Id.* The House Committee said:

> Traditionally, there has been a close working relationship between the Justice Department and the

> SEC. The Committee fully expects that this cooperation between the two agencies will continue with respect to the enforcement of the provisions of this bill.

H.R. Rep. No. 640, 95th Cong., 1st Sess. 10 (1977).

Although the legislative history of the Foreign Corrupt Practices Act is not directly probative of congressional intent governing the '33 and '34 Acts, these statements by the 95th Congress are nevertheless entitled to some weight. The remarks in the committee reports concerning the investigative practices of the SEC and Justice were not intended to change, but to reaffirm, past practice. This indicates that Congress understands and approves of the "close working relationship" between the agencies in their investigative capacities. Since such a "close working relationship" will govern the activities of the agencies in enforcing the laws against questionable foreign payments under the new statute, it would be impractical for us to attempt to screen the agencies from each other when they are investigating the same sort of offense under the former statutes.

Congress manifestly did not intend that the SEC be forbidden to share information with Justice at this stage of the investigation. Under the panel majority's theory of the case the SEC would be foreclosed from sharing the fruits of its investigation with Justice as soon as Justice begins its own investigation through a grand jury. Only by waiting until the close of the SEC proceeding before initiating its own grand jury investigation could Justice obtain access to the evidence procured by the SEC. In view of Congress' concern that the agencies share information "at the earliest stage of any investigation in order to insure that the evidence needed for a criminal prosecution does not become stale," S. Rep. No. 114, *supra*, at 12, and that the agencies avoid "a costly duplication of effort," H.R. Rep. No. 640, *supra*, at 9, it would

be unreasonable to prevent a sharing of information at this point in the investigation.

Third, we note that there is little or no judicial precedent for the panel's modification. The only support adduced by the panel opinion is a District Court opinion in *SEC v. Gilbert*, 79 F.R.D. 683 (S.D. N.Y. 1978). In that case, which arose on the defendant's request for a protective order under the discovery rules of the Federal Rules of Civil Procedure—as contrasted to an investigative subpoena enforcement proceeding as in this case—the court ordered the SEC "not to furnish the U.S. Attorney specially with any information procured in the course of discovery in this case." *Id.* at 687. The court offered no authority for this order nor, indeed, any reason for its application. While we recognize the similarity of *Gilbert* to this case in many respects, its lack of reasoning and its distinguishable procedural posture make it but weak authority.[49]

In fact, the reasoning of the Supreme Court in *LaSalle* is contrary to that of the panel in two respects, and should govern this case in lieu of *Gilbert*. The *LaSalle* Court considered, and explicitly rejected, the course adopted by the panel majority: "[I]t is unrealistic to attempt to build a partial information barrier between the two branches of the executive." *United States v. LaSalle Nat'l Bank, supra*, 437 U.S. at 312. More fundamentally, the *LaSalle* Court conceived of the controversy before it as an analysis of the good or bad faith of the IRS investigation. A bad faith investigation, in the

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[49] The panel majority did not deal directly with two decisions much closer to the instant case on their facts. Both were decided in favor of the SEC without modification. *SEC v. Drucker*, [Transfer Binder 1979] Fed.Sec.L.Rep. (CCH) ¶ 96,821 (S.D. N.Y. March 30, 1979); *Gellis v. Casey*, 338 F.Supp. 651 (S.D. N.Y. 1972). *See* panel slip op. at 12 n.29, 14 n.31.

Court's conception, is one conducted solely for criminal enforcement purposes. *See id.* at 307-308, 316, & 316 n.18. Where the agency has a legitimate noncriminal purpose for the investigation, it acts in good faith under the *LaSalle* conception even if it might use the information gained in the investigation for criminal enforcement purposes as well.[30] In the present case the SEC plainly has a legitimate noncriminal purpose for its investigation of Dresser. It follows that the investigation is in good faith, in the absence of complicating factors. There is, therefore, no reason to impose a protective order such as that imposed by the panel majority.

Finally, we note that the panel's modification would serve no compelling purpose, and might interfere with enforcement of the securities laws by the SEC and Justice. As the Second Circuit has said, the procedure permitting the SEC to communicate with Justice during the preliminary stages of an investigation has "significant advantages." *United States v. Fields*, *supra*, 592 F.2d at 646.

> Allowing early participation in the case by the United States Attorney minimizes statute of limitations problems. The more time a United States Attorney has, the easier it is for him to become familiar with the complex facts of a securities fraud case, to prepare the case, and to present it to a grand jury before expiration of the applicable statute of limitations. Earlier initiation of criminal proceedings moreover is consistent with a defendant's right to a speedy trial. * * *

Id. The panel's modification would "interfere with this commendable example of inter-agency cooperation," *id.*, to the detriment of securities law enforcement and in

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[30] So long as the Commission evinces no other indicium of bad faith. *See United States v. LaSalle Nat'l Bank*, *supra* note 25, 437 U.S. at 317 n.19.

contravention of the will of Congress.[51] On the other side of the balance, the panel's concern for preserving the limitations on criminal discovery is largely irrelevant at this stage of the proceedings, as Dresser agrees.[52] Thus this would be an inappropriate situation to impose a "prophylactic" rule against cooperation between the agencies. We believe the courts can prevent any injustice that may arise in the particular circumstances of parallel investigations in the future. We decline to adopt the position of the panel majority.

V. Other Issues

Several issues remain.

First, Dresser argues that enforcing the SEC subpoena would breach an agreement of confidentiality made at the January 27, 1976 meeting between SEC and Dresser representatives. The District Court held that "[t]hroughout the voluntary disclosure program the SEC reserved its rights to pursue a formal investigation and issue

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[51] In its brief Justice suggests a number of practical problems that might ensue from the panel's modification: (1) that Justice might have to forego any assistance from the SEC in enforcing the Foreign Corrupt Practices Act or other regulatory laws involving parallel investigations; (2) that agency attorneys might not be legitimately appointed as special assistant United States Attorneys to assist in preparing cases for grand juries; (3) that a grand jury witness might gain effective immunity from criminal prosecution by providing sole, original copies of inculpatory documents to the SEC; (4) that prosecutors might be unable to learn of prior testimony by grand jury witnesses; (5) that prosecutors might be denied access to exculpatory information, evidence of perjury, or a prior inculpatory statement; and (6) that the prosecutor might find it impossible to comply with his responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Jencks v. United States*, 353 U.S. 657 (1957).

[52] *See* text at notes 33-34 *supra*.

subpoenas if necessary. It is readily apparent that the SEC never agreed to completely forego its rights to subpoena the material in question." 453 F.Supp. at 575. We have examined the record and do not find that the District Court's determination on this point was clearly erroneous.

Second, Dresser argues that the District Court erred in granting judgment for the SEC without permitting Dresser to conduct discovery into the propriety of the SEC investigation. Although the precise nature of Dresser's desired discovery is not clear, the company apparently would investigate: (1) the SEC criminal referral and the concurrent criminal investigation, with a view to the possibility that the SEC has proceeded in bad faith; (2) the ethical propriety of SEC agents' participation in the criminal investigation; (3) the existence of an SEC commitment of confidentiality; and (4) the basis for the SEC staff's decision to request a formal investigation of Dresser. *See* brief of respondent-appellant at 36-42.

We recognize that discovery may be available in some subpoena enforcement proceedings where the circumstances indicate that further information is necessary for the courts to discharge their duty. *United States v. Fensterwald*, 553 F.2d 231 (D.C. Cir. 1977) (*per curiam*); *United States v. Wright Motor Co.*, 536 F.2d 1090 (5th Cir. 1976). For example, the Supreme Court in *LaSalle* apparently contemplated some degree of discovery in IRS summons cases to determine the institutional good faith of the IRS in issuing such summonses. *United States v. LaSalle Nat'l Bank*, *supra*, 437 U.S. at 316-317; *id.* at 320 (dissenting opinion); *United States v. Marine Midland Bank*, 585 F.2d 36, 38-39 (2d Cir. 1978) (*per curiam*). However, district courts must be cautious in granting such discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisi-

tions into the practices of the regulatory agencies. *See FTC v. Anderson*, —— F.2d ——, —— (D.C. Cir. No. 78-1032, decided September 17, 1979) (slip opinion at 5). Discovery should be permitted only where the respondent is able to distinguish himself from "the class of the ordinary [respondent]," *United States v. Fensterwald*, *supra*, 553 F.2d at 231-232, by citing special circumstances that raise doubts about the agency's good faith. Even then, district courts must limit discovery to the minimum necessary in the interests of justice by requiring specific interrogatories or affidavits rather than "full-dress discovery and trial." *United States v. Marine Midland Bank*, *supra*, 585 F.2d at 39; *see United States v. Fensterwald*, *supra*, 553 F.2d at 232-233.

We conclude that the District Court acted within its discretion in denying Dresser discovery in this case, and that it properly granted judgment to the SEC on the record before it. There was nothing improper about the SEC's decision to transmit the files of the participants in the Voluntary Disclosure Program to Justice, or about the subsequent concurrent investigations by the two agencies. Nor does the participation of two SEC attorneys in the Justice task force cast doubt upon the good faith of the Commission. Dresser's allegations of an agreement by the SEC not to subpoena the documents underlying its voluntary report are not substantiated by any writing, and are directly contrary to the published terms of the Voluntary Disclosure Program.[53] Finally, Dresser's suggestion that the order of investigation is improper because there was no "likelihood that a violation has been or is about to be committed," *see* 17 C.F.R. § 202.5 (1979), does not distinguish Dresser from any other recalcitrant subpoena respondent. At this stage of the investigation neither this court nor the SEC could know

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[53] Report, *supra* note 4, at 32; *see* text at note 8 *supra*.

whether Dresser has violated the law. The Commission's discretion concerning which potential violators to investigate is, while not unbounded, extremely broad. Dresser has suggested no improper motive for the SEC investigation, *cf. United States v. Fensterwald*, *supra*, 553 F.2d at 232 (respondent's political and professional activities "could easily have spurred the Internal Revenue Service to take an extraordinary interest in this particular taxpayer"). Dresser's bare protestations of innocence do not suffice to call the SEC's bona fides into question.[54] We therefore affirm the District Court's decision on this point.

Two remaining substantive issues raised by Dresser do not require decision by this court at this time. Those issues are: the asserted right of Dresser or its employees to protect portions of the documents from public disclosure because of the possibility of hostile and injurious foreign reaction, and the asserted attorney-client privilege of Dresser or its employees with respect to some of the documents. Despite Dresser's suggestion to the contrary, *see* brief of respondent-appellant at 42-47, we conclude that the District Court did not reach the merits of Dresser's claims on these points.

With respect to confidentiality, the court noted that the SEC had offered to give Dresser ten days notice in advance of disclosure of the documents to the public, to enable the company to challenge the decision to disclose. This offer the court found to be "adequate" to protect Dresser's interests at this stage of the proceeding. 453

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[54] Dresser's allegation that the staff "repeatedly told Dresser that it knew of no securities violation," brief of respondent-appellant at 41, does not alter the case. By the time the Commission decided to issue the order of investigation, the staff had officially concluded otherwise. *See* order directing private investigation and designating officers to take testimony, JA 7-9.

F.Supp. at 576.[55] With respect to the attorney-client privilege, the District Court properly declined to evaluate Dresser's claims in generality, stating that such claims at this point are "vague and conclusory." *Id.* The court further said that "[c]ertainly not all of the material sought is privileged," and indicated that the investigative report prepared by Dresser as part of the Voluntary Disclosure Program is not privileged. *Id.* Dresser apparently does not dispute either of these specific conclusions. Brief of respondent-appellant at 43, 44.

We agree with the District Court that Dresser's claims of confidentiality and of attorney-client privilege cannot be judged by the courts on this record at this stage of the proceeding. Rather, once the subpoena has been enforced the SEC will have the opportunity to rule on specific requests for confidential treatment and assertions of attorney-client privilege. This procedure will follow the outlines described by this court in *FTC v. Texaco, Inc.*, 555 F.2d 862, 883-885 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977), and the Supreme Court in *FCC v. Schreiber*, 381 U.S. 279, 290-291, 295-296 (1965).

We recognize that Judge Parker in the grand jury investigation of Dresser said that Dresser's concern for the lives of its employees and their families and property

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[55] The court said:

> Furthermore, the Commission has offered to give Dresser ten days notice in the event that there is a FOIA request and the SEC determines the material is not exempt and must be disclosed. These assurances of confidentiality are adequate and Dresser is entitled to no more. * * *

453 F.Supp. at 576. We interpret the SEC's offer as encompassing any decision to release the documents, whether or not pursuant to the FOIA. Moreover, we assume that, upon examination of particular documents or groups of documents, the SEC has the authority to stiffen the confidentiality or notice agreement.

abroad in the event of public disclosure of portions of the documents is "not illusory and should not be lightly considered," *see* JA 163, but we believe that the SEC will be in a better position to evaluate this claim than the courts are now. This court has commented before that the danger that confidential materials might be wrongfully released to the public through the Freedom of Information Act is "by no means frivolous," *FTC v. Anderson, supra*, —— F.2d at —— n.11, slip opinion at 12 n.11. Courts have held an offer of ten days notice before release of information to be adequate protection in several cases involving business information. *Id.*, —— F.2d at ——, slip opinion at 8; *FTC v. Texaco, Inc., supra*, 555 F.2d at 884-885; *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F.Supp. 555, 563 (W.D. Pa. 1979). The District Court approved a similar arrangement in this case with respect to Dresser's subpoenaed documents in general. We do not read the opinion as approving such a procedure with respect to all documents in this case, no matter how sensitive they may prove to be. The decision whether to accord greater protection to certain documents where release might endanger employees' lives abroad must be made in the first instance by the Commission, which will be able to inspect the documents and hear argument on the issue.[56]

The question of the attorney-client privilege must be resolved in a similar manner: viewed initially by the Commission with later review in the courts if necessary.

We see no ground for reversal in the District Court's determinations on the confidentiality and attorney-client privilege issues.

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[56] We note that, except in "egregious cases," the SEC has stated it would not require more than "generic" disclosure to the public of questionable foreign payments. Report, *supra* note 4, at 9 n.8.

The final issue in this case is that raised in No. 78-1705: whether the District Court erred in its decision of June 23, 1978, JA 532, *reconsideration denied*, JA 559, denying Mr. Edward R. Luter, a senior vice president of Dresser, the right to intervene in this enforcement proceeding on behalf of himself and other employees of Dresser. Mr. Luter claims an interest in the proceeding on bases of an alleged confidentiality interest on the part of the employees in certain documents and an alleged attorney-client privilege. The District Court rejected Mr. Luter's motion to intervene, saying:

> Mr. Luter has failed to demonstrate any proper basis for reconsideration, for intervention as a matter of right, or for intervention as a matter of discretion. Even if there was an attorney-client privilege to be invoked in this case, it would be the corporation's and not the employees'. In addition, the employees had no constitutional right of privacy concerning the communications in question. * * *

JA 559 (order denying reconsideration).

We are somewhat troubled by the District Court's treatment of Mr. Luter's motion. It appears that the court rejected his claim on the merits without first allowing him to pass the threshold. In this circuit an applicant to intervene need only show that the representation of his interest may be inadequate; the burden of proof rests on those resisting intervention. *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). In cases of alleged corporate misconduct it is especially important for the courts to be alert to the possibilities of conflict between the interests of the corporation and those of its employees.

In this case, however, we need not judge whether the court was correct in its conclusion that Mr. Luter had asserted no cognizable interest in the proceedings. With the benefit of hindsight, and informed by the arguments Mr. Luter has made on his behalf in this appeal, we are

able to conclude that Dresser has adequately represented the interests of its employees through this stage of the litigation. So far, the disputes have centered on the enforceability of the SEC subpoena, not on particular questions of confidentiality or privilege pertaining to individual documents. We do not understand the District Court as having rejected the right of Mr. Luter or any other Dresser employees to intervene in future proceedings concerning this investigation. On the understanding that Mr. Luter or his fellow employees may seek to intervene in future SEC proceedings concerning confidentiality and the attorney-client privilege, and in any court proceedings that might follow, and that the SEC and the courts will evaluate any such motions to intervene afresh and on their merits, we affirm the judgment of the District Court in No. 78-1705. As previously indicated, we affirm the judgment of the District Court in No. 78-1702 as well.

The judgments of the District Court are

Affirmed.

Concurring Opinion of *Circuit Judge* EDWARDS: I concur in the opinion of the court in this case. I wish to point out, however, that I do not read the court's opinion as expressing any view as to the proper outcome in a case of this sort *once an indictment has issued. See* text of opinion at notes 33-34, *supra.* Once an indictment has issued, the policy interest expressed in *United States v. LaSalle National Bank*, 437 U.S. 298, 312 (1978), concerning the impermissibility of broadening the scope of criminal discovery through the summons authority of an agency, may come into play. I express no opinion as to whether or not the summons authority of a government agency may continue once an indictment has been issued or, if it may, whether protective conditions need be placed on the exercise of that power. These issues raise questions which are not presented here. The resolution of these questions, therefore, must await another day.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1702

SECURITIES AND EXCHANGE COMMISSION

v.

DRESSER INDUSTRIES, INC., APPELLANT

No. 78-1705

SECURITIES AND EXCHANGE COMMISSION

v.

DRESSER INDUSTRIES, INC., EDWARD R. LUTER, APPELLANT

Appeal from the United States District Court for the District of Columbia

(Miscellaneous No. 78-0141)

Argued December 11, 1978

Decided November 19, 1979

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

David R. MacDonald with whom *Edward E. Dyson* and *Francis D. Morrissey* were on the brief, for appellant in No. 78-1702.

Raymond G. Larroca with whom *Herbert J. Miller, Jr.* and *Thomas B. Carr* were on the brief, for appellant in No. 78-1705.

James H. Schropp, Assistant General Counsel, Securities and Exchange Commission with whom *Paul Gonson*, General Counsel, Securities and Exchange Commission was on the brief, for respondent.

Before: BAZELON, *Senior Circuit Judge*, ROBB, *Circuit Judge* and BRYANT,* *Chief Judge*, United States District Court for the District of Columbia.

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

BAZELON, *Senior Circuit Judge*: Appellant Dresser Industries, Inc. (Dresser) appeals from an order of the district court enforcing a subpoena duces tecum issued by the SEC. The SEC subpoenaed Dresser's documents while investigating possible securities law violations arising out of certain "questionable" foreign payments allegedly made by the company. Dresser primarily bases its resistance to the subpoena on the Supreme Court's recent decision in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), arguing that the SEC's civil subpoena must be quashed since the Commission referred Dresser's case to the Department of Justice for criminal prosecution and Justice has in fact begun presenting Dresser's case to a grand jury. We affirm the district court's order enforcing the subpoena, with modifications to main-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

tain the separation between the criminal and civil enforcement proceedings.[1]

I. Background

The SEC's Inquiry

In 1974, in the wake of reports that several American corporations had made illegal political contributions, the SEC began an investigation to determine whether the nondisclosure of those payments might constitute a violation of the federal securities laws.[2] The Commission's inquiry quickly grew to encompass securities law violations arising out of illegal foreign transactions as well as domestic payments. The SEC brought a number of enforcement actions as a result of its investigations, but the Commission soon determined that the magnitude of the problem required additional measures to bring corporations into compliance with the securities laws.[3] The SEC therefore instituted a "voluntary disclosure program." The SEC encouraged corporations to conduct internal investigations under the direction of those not involved in the "questionable activities," to determine if previously undisclosed matters should be reported to the SEC and the investing public.

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[1] In No. 78-1705, Edward R. Luter, a senior vice president of Dresser, appeals from an order denying Luter's motion to intervene in the subpoena enforcement proceeding. For the reasons that appear below, *see* section IV *infra*, we affirm the order denying intervention.

[2] The history of the SEC's inquiry into questionable domestic and foreign payments is outlined in Securities and Exchange Commission, *Report on Questionable and Illegal Corporate Payments and Practices*, submitted to Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (May 12, 1976), *reprinted in* CCH Federal Securities Law Reports 642 (May 19, 1976) [hereinafter *Report*].

[3] *Id.* at 6-7.

The "unique problems involved in the disclosure of questionable or illegal foreign payments" [4] led the SEC to establish special procedures for handling disclosures pursuant to the voluntary disclosure program.[5] The Com-

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[4] *Id.* at 7.

[5] Specifically, companies that may have engaged in questionable or illegal activities were required to take the following steps:

1. Authorize a careful in-depth investigation of the facts relating to questionable or illegal foreign or domestic activities by persons not involved in the activities in question. If practicable, such persons should report and be responsible to a committee comprised of members of the board of directors who are not officers of the company and who were not involved in the suspected questionable or illegal practices.

   Generally, assistance should be sought from the independent accounting firm that regularly audits the corporation unless the circumstances suggest otherwise.

   The committee also should consider retaining outside counsel. The investigation should encompass the prior five years, the period covered by the financial statements required in annual reports and registration statements filed pursuant to the federal securities laws, but also should examine any events occurring prior to that time that may appear to be part of a continuing program or to be related to existing material contracts or business operations. At the conclusion of the investigation, the committee should prepare and submit to the full board of directors a report setting forth its findings. The report should, to the extent possible, contain detailed information about each payment; its purpose and amount; the recipient; the country in which the payment was made and the circumstances in which payment occurred.

2. The board of directors should issue an appropriate policy statement with respect to transactions involving illegal or questionable activities in the United States or abroad, or reiterate any relevant, pre-

mission urged companies to consult with the SEC staff to resolve any uncertainties concerning the nature and scope of the required disclosures.[6]

In 1976, Dresser's counsel met with representatives of the SEC to discuss Dresser's participation in the voluntary disclosure program. At that meeting Dresser indicated it would conduct an internal inquiry concerning "questionable" transactions,[7] and in 1976 and early 1977, Dresser reported the results of its investigation in three filings submitted to the SEC.[8]

The Commission staff, however, was unsatisfied with both the scope and detail of Dresser's disclosures. Accordingly, the Commission staff sought access to Dresser's

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existing policy statement. Normally, this statement should include a declaration of cessation of such activities, if any, and a prohibition against the maintenance of improper books and records and inadequate supporting documentation relating to such activities. The adoption of such a policy should be communicated to appropriate corporate personnel, implemented by adequate internal controls and safeguards, and monitored by auditing programs established by the independent auditors.

3. The corporation should consider whether interim public disclosure of the results should be made prior to completion of the investigation. This disclosure generally is made on a Form 8-K filed with the Commission, supplemented in some cases by the issuance of a press release.

4. At the conclusion of the investigation, a final report of material facts must be filed with the Commission, generally on Form 8-K.

Id. at 8-10 (footnotes omitted).

[6] *Id.* at 7 & n.5.

[7] Affidavit of W. Lyall Milde, Joint Appendix (J.A.) 64-65.

[8] Dresser filed three Form 8-K's with the SEC reporting questionable payments: January 28, 1976 (J.A. 100-02); November 11, 1976 (J.A. 103-08); and February 10, 1977 (J.A. 109-13).

internal report and underlying documents to verify the completeness and accuracy of the disclosures. Dresser denied the staff's request, citing an alleged promise of confidentiality and Dresser's concern that the documents might be disclosed publicly pursuant to the Freedom of Information Act.[9] The Commission denied that the staff had ever made any commitment not to seek Dresser's internal documents.[10] Further, the SEC promised to respect Dresser's interest in confidentiality by notifying Dresser 10 days before the release of any documents under FOIA.[11] Dresser would thus have an opportunity to seek protection and review from the courts.

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[9] Letter of David R. Macdonald, counsel to Dresser, July 15, 1977 (J.A. 71-76). Dresser and its employees fear that they may be subject to physical reprisals if the allegedly illegal foreign transactions are revealed publicly. Indeed, Luter has suggested that the disclosure of certain information furnished to Dresser by its employees "could place in jeopardy the lives of Dresser's employees abroad." Luter Br. at 4.

[10] In support of its position, the SEC cites a letter from Vice President Luter to the SEC, dated January 12, 1977, which provides in pertinent part:

> Dresser Industries, Inc. undertakes to provide the staff of the Enforcement Division access to its report and supporting documents prepared in connection with the special inquiry described in * * * Form 8-K. We understand that the confidentiality of such information will be preserved with respect to details as to countries and parties subject, of course, to the fact that if a formal inquiry is instituted by the Commission, it will be governed by your usual procedures.

Exhibit B to Commission Opposition to Motion for Discovery; SEC Br. at 6-7 & n.15. The Commission also maintains that access to underlying documents was a requirement of the voluntary disclosure program from its inception. *See Report, supra* note 2, at 9 n.8.

[11] Letter of Marvin G. Pickholz, April 20, 1978, J.A. 12; J.A. 285. This promise was noted in the district court's decision in this case SEC v. Dresser Industries, Inc., 453 F. Supp. 573, 576 (D.D.C. 1978).

The Justice Department's Investigation

At the same time that the SEC was conducting its inquiry into possible securities law violations arising out of questionable foreign payments, the Justice Department convened a "Task Force on Transnational Payments" to investigate possible criminal violations of the securities and other federal laws.[12] Two SEC attorneys participated in the Task Force's work, although the SEC maintains that those representatives were not connected with the SEC's civil investigation of Dresser.[13]

Pursuant to an order of the Commission, the SEC made available its investigative files on Dresser and other corporations to the Justice Department Task Force in August, 1977.[14] The Task Force began a criminal investigation and, in January, 1978, the Justice Department began presenting Dresser's case to a federal grand jury in the District of Columbia.[15]

The Ensuing Litigation

Dresser initially sought to enjoin both the civil and criminal investigations by filing a complaint in the District Court for the Southern District of Texas in March 1978.[16] While that proceeding was pending, the grand jury subpoenaed a number of documents from Dresser. Dresser moved unsuccessfully to quash the grand jury

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[12] The Task Force is said to have begun its investigation in May, 1976. *See* Dresser Br. at 5; J.A. 284, 357.

[13] J.A. 284-85. *See* TAN 59 *infra.*

[14] Dresser Br. at 7; J.A. 296.

[15] Affidavit of David R. Macdonald, J.A. 68-70.

[16] Dresser Industries, Inc. v. United States, Civil Action No. H-78-405 (S.D. Tex.).

subpoena.[17] However, Judge Parker did agree to enter an order requiring the grand jury secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure to be "strictly enforced." Thereafter, Dresser complied with the grand jury subpoena.

Meanwhile, the SEC went forward with its own inquiry. On April 11, 1978, the SEC ordered a formal investigation [18] and on April 21, 1978 the SEC issued the subpoena for Dresser's records that is at issue in this case.[19] According to Dresser, although the SEC subpoena concerned the same "matter" as that under investigation by the grand jury, the SEC requested "many additional documents" beyond those required by the grand jury subpoena.[20]

In May 1978, the District Court for the Southern District of Texas dismissed Dresser's injunctive action against both the SEC and Justice.[21] Dresser then returned to the District of Columbia and attempted to quash the SEC subpoena. In support of its motion to

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[17] Judge Parker's order of May 19, 1978 is unreported. The order and accompanying memorandum have been filed under seal with this court as Exhibit D to SEC's Statement of Points and Authorities in Opposition to Motion for Discovery.

[18] *In re Dresser Industries*, File No. HO-1089 (April 11, 1978), J.A. 7-9. The order was entered pursuant to the SEC's authority under § 20(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77t (1976), and under § 21(a) of the Securities and Exchange Act of 1934, as amended, 15 U.S.C. § 78u(d) (1976).

[19] J.A. 15-16.

[20] Dresser Br. at 8.

[21] The Justice Department's motion to dismiss was granted on May 1, 1978 (J.A. 162), that of the SEC on May 26, 1978 (J.A. 114-32). Both district court orders were affirmed on appeal. *See* Dresser Industries, Inc. v. United States, Fed. Sec. L. Rep. (CCH) ¶ 96,925 (5th Cir. June 13, 1979).

quash, Dresser sought to conduct discovery. Judge Flannery denied the motion for discovery on June 16, 1978.[22] Two weeks later, the district court denied Dresser's motion to quash and simultaneously granted the SEC's cross-motion for enforcement of the subpoena.[23] After the district court denied Dresser's motion for reconsideration and stay, this court stayed the district court's decision on August 14, 1978.[24]

II. The Applicability of *LaSalle*

The principle issue raised in this appeal is whether the Supreme Court's decision in *United States v. LaSalle National Bank, supra*, forbids an SEC subpoena of Dresser's records after the agency has "referred"[25] the case

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[22] SEC v. Dresser Industries Inc., Misc. No. 78-0141 (D.D.C. June 16, 1978), J.A. 257.

[23] Judge Flannery's decision is reported at 453 F. Supp. 573 (D.D.C. 1978).

[24] SEC v. Dresser Industries Inc., Nos. 78-1702, 78-1705 (D.C. Cir. Aug. 14, 1978), J.A. 482.

[25] The Commission is authorized by statute to transmit evidence concerning possible criminal violations of the securities and other laws to the attorney general. *See* § 20(b) of the Securities Act, 15 U.S.C. § 77t (1976); § 21(a) of the Exchange Act, 15 U.S.C. § 78u(d) (1976). In practice, the Commission's cooperation with the Justice Department and in particular the U.S. Attorneys' offices takes a variety of forms. *See generally* Amicus Curiae Brief of SEC in United States v. Fields, J.A. 404-20. These range from a casual sharing of information that may be of interest to the United States Attorney when the Commission has not begun a formal investigation (J.A. 415-17), to more formal procedures used after the SEC institutes a formal investigation (J.A. 417-19). In the latter case the SEC may make either an "informal" criminal reference, making all investigating files available to the U.S. Attorney, or a formal criminal reference, where the authorization of access is accompanied by a formal report by the Commission staff including recommendation con-

to the Department of Justice and Justice has sought an indictment against Dresser.

A.

LaSalle is the most recent in a series of Supreme Court decisions elaborating the propriety of compelling a taxpayer to produce documents under § 7602 of the Internal Revenue Code (IRC)[26] when the taxpayer may also be subject to criminal prosecution. In *LaSalle*, the Supreme Court determined that § 7602 did not authorize the IRS to issue a civil summons after the IRS had recommended a case to the Justice Department for prosecution. 437 U.S. at 311-313. The Court reasoned that permitting civil discovery after recommendation to the Justice Department might substantially broaden the criminal discovery rights of the Justice Department and infringe the traditional role of the grand jury. *Id.* at 312, 313 n.15. Yet the Court found no evidence in § 7602 or its legislative history that Congress intended to alter the established framework for criminal discovery or to infringe the role of the grand jury. *Id.*

Dresser argues that *LaSalle* is directly applicable here. In Dresser's view, the SEC's decision to transmit its files to Justice was equivalent to the IRS's recommendation to prosecute in *LaSalle*. Dresser contends that permitting

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cerning prosecution. Both the informal and formal reference require Commission approval. J.A. 417.

The reference made in this case was "informal," *i.e.*, the SEC made its investigating files available to the Justice Department pursuant to an order of the SEC, but the reference was not accompanied by a recommendation for prosecution. *See* SEC v. United Brands Co., Fed. Sec. L. Rep. (CCH) ¶ 95,263 (D.D.C. July 18, 1975) (SEC decision to make files available to Justice Department equivalent to a "reference" under the Exchange Act.).

[26] 26 U.S.C. § 7602 (1976).

continued civil discovery after this "reference" for prosecution poses dangers identical to those enumerated in *LaSalle*. Therefore, Dresser maintains that the rule of *LaSalle* (or at least the policy behind it) prohibits the SEC subpoena here in question.

The government distinguishes this case from *LaSalle* on a number of grounds. First, the government argues that the SEC's decision to make its files available to Justice is not equivalent to the recommendation for prosecution at issue in *LaSalle*. The SEC suggests that, at most, the *LaSalle* rationale should apply only when the SEC makes a "formal" criminal reference. Second, the government contends that, in contrast to § 7602 of the IRC, the relevant legislation here shows clear congressional intent to expand the Justice Department's access to information and to encourage cooperation between the SEC and Justice in investigating illegal corporate payments. Finally, the SEC argues that, unlike civil tax investigations following a recommendation to prosecute, an SEC civil investigation is independent of the Justice Department's control.

B.

For a number of years courts have attempted to define the permissible scope of civil discovery when the individual from whom it is sought is also the target of pending or potential criminal charges.[27] The problem is particularly acute in tax investigations, where the pursuits of

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[27] The problem dates back at least to Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912), a case involving parallel civil and criminal proceedings under the Sherman Act. *See generally Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1331-1340 (1979) [hereinafter *Developments*].

civil and criminal remedies are deeply intertwined.[28] Thus the proper relationship between civil and criminal discovery has received the most attention through interpretation of § 7602 of the IRC, the IRS's civil summons authority.[29]

In *Reisman v. Caplin*, 375 U.S. 440, 449 (1964), the Supreme Court first suggested that a summons pursuant to § 7602 could not be enforced if "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." That dictum was clarified somewhat in *Donaldson v. United States*, 400 U.S. 517,

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[28] For example, as the Court noted in *LaSalle*, once the IRS recommends prosecution to the Department of Justice, only the Attorney General or his delegate can compromise the civil as well as the criminal cases. *See* United States v. LaSalle National Bank, *supra*, 437 U.S. at 312; 26 U.S.C. § 7122(a) (1976).

[29] Although courts have also considered the relation between civil and criminal discovery in other contexts, decisions considering the scope of IRS subpoena authority under § 7602 are particularly apposite to the instant case for two reasons. First, they are concerned with the appropriate scope of discovery attendant to *administrative* (rather than civil) proceedings while criminal charges are pending or in the offing. *Compare* Gordon v. FDIC, 427 F.2d 578 (D.C. Cir. 1970) (discovery sought by FDIC in suit to recover debt while criminal charges pending against the debtor); SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978) (discovery sought by SEC in civil action against broker subject to grand jury investigation). Second, the concern in this case and in the *LaSalle* line of cases is that permitting broad administrative discovery may impermissibly broaden the *government's* right of criminal discovery. In contrast, many discussions outside the § 7602 context have been limited to the danger that criminal *defendants* will obtain improper discovery from the government through the use of liberal discovery provisions. *See, e.g.*, United States v. Mellon Bank, N.A., 545 F.2d 869, 872-73 (3rd Cir. 1976); Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). *See generally Developments*, *supra* note 27, at 1320-1330.

532-536 (1971), where the Court upheld the use of a § 7602 summons even though the civil investigation "has the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer." *Id.* at 532. *Donaldson* explained that the observation in *Reisman* applied primarily "to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes." *Id.* at 533.

Some lower courts fashioned a bright line approach for implementing *Donaldson*. They suggested that a § 7602 summons should be prohibited *only* after the IRS recommended prosecution to the Department of Justice. *See, e.g., United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36, 41-42 (2d Cir.), *cert. denied*, 439 U.S. 822 (1978).

In *LaSalle*, the Court agreed that in no case did § 7602 authorize a summons after the IRS had recommended prosecution. But, over the protests of the dissenters, the Court also left open the possibility that some summonses would be unenforceable even before a recommendation for prosecution, if the IRS's "investigation has solely criminal purposes." *LaSalle*, 437 U.S. at 316-17. The Court's refusal to adopt the bright-line *Morgan Guaranty* approach thus makes clear that it is not the recommendation of prosecution per se but rather the possibility that a civil subpoena will be used for unauthorized criminal discovery that underlies the limitations placed on issuing § 7602 summonses.

C.

Misuse of a civil subpoena is most likely when criminal charges are already pending against the target of the civil investigation. Indeed, it is precisely this situation

that concerned the Court in *Reisman* and *Donaldson*.[30] The strongest case for limiting the SEC's subpoena power is presented when simultaneous criminal and civil proceedings are underway, regardless of whether the SEC "recommended" criminal prosecution.[31]

Nonetheless, the Court in *LaSalle* did not condemn the simultaneous pursuit of civil and criminal *remedies* for the violation of federal laws. The Court prohibited only post-recommendation civil *discovery* by the IRS as a "prophylactic restraint," deemed necessary because the close interrelationship between the IRS and Justice in tax cases made it "unrealistic to attempt to build a partial information barrier between the two branches of

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[30] As the Court said in Donaldson:

> [W]here the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied. This, of course, would likely be the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons.

400 U.S. at 533 (footnotes omitted).

It is significant that the Court traced the genesis of this doctrine to United States v. O'Connor, 118 F.Supp. 248 (D. Mass. 1953), where, in the words of the *Donaldson* Court, "the taxpayer already was under indictment." 400 U.S. at 533.

[31] Accordingly, we think that the absence of a formal SEC recommendation to prosecute is irrelevant to our analysis in this case, where the Justice Department has decided to go forward with criminal charges. We need not decide whether restrictions on the use of subpoenaed material would be necessary where the SEC has made a "reference" (either formal or informal, *see* note 25 *supra*), but the Justice Department has taken no action on that reference. *Cf.* SEC v. Drucker, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,821 (S.D.N.Y. March 30, 1979), where the court refused to stay the SEC's civil enforcement proceedings when the SEC had made its files available to the U.S. Attorney but no criminal proceeding had been instituted.

the executive." [32] Nothing in *LaSalle* suggests that the IRS must necessarily "defer civil proceedings pending the ultimate outcome of a criminal trial." [33]

As we noted in *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C. Cir. 1970), "[t]here may be cases where the requirement that a criminal defendant participate in a civil action . . . violates concepts of elementary fairness in view of the defendant's position in an interrelated criminal prosecution." In those instances, a complete stay of

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[32] United States v. LaSalle National Bank, *supra*, 437 U.S. at 312. The Court observed:

> Logically, then, the IRS could use its summons authority under § 7602 to uncover information about the tax liability created by a fraud regardless of the status of the criminal case. But the rule forbidding such is a prophylactic intended to safeguard . . . policy interests [in limiting criminal discovery and preserving the grand jury as "the principal tool of criminal accusation"].

Id.

[33] United States v. Kordel, 397 U.S. 1, 11 (1970). *See also* United States v. Parrott, 425 F.2d 972, 976 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); DeVita v. Sills, 422 F.2d 1172, 1178-81 (3rd Cir. 1970). Unlike the contentions raised in *DeVita* and *Parrott*, Dresser's contention is not founded on a possible infringement of the Fifth Amendment's privilege against self-incrimination. Indeed, as Dresser recognizes, any claims of privilege are premature prior to determining whether the subpoena is enforceable. Dresser Br. at 42-44; *see* TAN 60-61 *infra*. However, infringement of the privilege against self-incrimination is not the sole ground for limiting civil discovery when criminal charges are pending. As both *Kordel* and *LaSalle* make clear, unfairness to the defendant, or use of administrative subpoena power not authorized by Congress, might also justify restrictions on agency discovery. *See* United States v. Kordel, *supra*, 397 U.S. at 11; United States v. LaSalle National Bank, *supra*, 437 U.S. at 312. *Accord*, SEC v. Gilbert, *supra*, 79 F.R.D. at 687.

all civil proceedings may be warranted.[34] In other circumstances, a stay of all civil discovery will provide adequate protection.[35] But our opinions suggest that protective orders short of a total ban on discovery may also be adequate in some cases to eliminate unfairness,[36] while permitting parallel civil and criminal proceedings to go forward.[37]

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[34] *See* United States v. Kordel, *supra*, 397 U.S. at 12 n.27: "Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution [citing cases]; sometimes at the request of the defense [citing cases]." *See also* Standard Sanitary Mfg. Co. v. United States, *supra*, 226 U.S. at 52 (whether stay of civil proceedings appropriate or necessary "depend[s] upon discretion of the court in the particular case").

[35] Gordon v. FDIC, *supra*, 427 F.2d at 580 n.4, *quoting* United States v. Kordel, *supra*, 397 U.S. at 9: "[W]e may assume that in such a case [where answering interrogatories would violate the privilege against self-incrimination] the appropriate remedy would be a protective order . . . postponing civil discovery until termination of the criminal action."

[36] *See, e.g.*, Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972); Dellinger v. Mitchell, 442 F.2d 782, 787 (D.C. Cir. 1971); McSurely v. McClellan, 426 F.2d 664, 671-72 (D.C. Cir. 1970); *see also* United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201, 203 (3rd Cir. 1967), *cert. denied*, 390 U.S. 922 (1968); Driver v. Helms, 402 F.Supp. 683, 686 (D.R.I. 1975); SEC v. Schlitz Brewing Co., 452 F.Supp. 824, 833 (E.D. Wis. 1978).

[37] United States v. Kordel, *supra*, 397 U.S. at 11. Appellants note, correctly, that in *Kordel* the government did not bring the criminal prosecution until *after* the defendant had responded to civil interrogatories. *See id.* at 5-6 (answer to interrogatories received approximately 10 months prior to HEW's recommendation that the Justice Department institute a criminal proceeding). Thus *Kordel* is not directly applicable here. But the Court's reference to Standard Sanitary Mfg. Co. v. United States, *supra*, 226 U.S. at 51-52,

We do not believe that it is necessary to bar all SEC subpoenas while criminal charges are pending in order to prevent any potential unfairness to appellants. There are two reasons why the strict *LaSalle* rule is inappropriate here. First, the relationship between the SEC and Justice is not nearly so "inherently intertwined" as that of IRS and Justice.[38] Second, there is a substantial

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makes clear that simultaneous proceedings are permissible. *See id.* at 52:

> The Sherman Act provides for a criminal proceeding to punish violations, and suits in equity to restrain such violations and the suits may be brought simultaneously or successively. . . . An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of power.

[38] In *LaSalle*, the Court explained:

> [T]he IRS, upon referral, loses its ability to compromise both the criminal and civil aspects of a fraud case. 26 U.S.C. § 7122(a). After the referral [from the IRS to Justice] the authority to settle [the civil tax liability] rests with the Department of Justice. Interagency cooperation on the calculation of the civil liability is then to be expected and probably encourages efficient settlement of the dispute. But such cooperation, when combined with the inherently intertwined nature of the criminal and civil elements of the case, suggests that it is unrealistic to attempt to build a partial information barrier between the two branches of the executive.

437 U.S. at 312.

In contrast, the SEC's enforcement responsibilities are independent of the Justice Department's role in prosecuting violations of the criminal law. *See, e.g.*, H.R. REP. No. 95-640, 95th Cong., 1st Sess. 9 (1977) [hereinafter HOUSE REPORT]:

> Since its creation in 1934, the Commission, through its own attorneys, has been solely responsible for the conduct of all civil litigation, both trial and appellate, to which the Commission is a party.

[Continued]

public interest in swiftly remedying civil securities laws violations.[39] In contrast, little prejudice to the public will result from delaying a civil tax proceeding until the conclusion of the criminal matter.[40] These two factors convince us that the broad prophylactic rule enunciated in *LaSalle* is inappropriate where the SEC and the Justice Department are simultaneously pursuing civil and criminal investigations.

D.

Although we conclude that the specific rule of *LaSalle* is inapplicable here, it does not follow that the government may use the SEC's broad subpoena power to subvert the limitations of criminal discovery. We cannot agree

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[38] [Continued]

See also S. REP. No. 95-114, 95th Cong., 1st Sess. 12 (1977) [hereinafter SENATE REPORT]:

> The arrangements which the committee expects the SEC and Justice to work out on criminal matters is in no way intended to cast doubt upon the authority of the SEC to prosecute and defend its own civil litigation.

[39] *See* SEC v. Gilbert, *supra*, 79 F.R.D. at 686: "[A] curtailment of civil actions would be indefensible in a context where, as here, a federal agency has been specifically charged to protect the public through civil enforcement actions"; *cf.* United States v. Kordel, *supra*, 397 U.S. at 11: "The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws." *See also* Arthurs v. Stern, 560 F.2d 477, 479 (1st Cir. 1977), *cert. denied*, 430 U.S. 1034 (1978) (medical disciplinary proceeding); United States v. Simon, 373 F.2d 649 (2d Cir.), *vacated as moot sub nom.* Simon v. Wharton, 389 U.S. 425 (1967) (bankruptcy proceedings).

[40] We recognized this distinction in *Gordon:* "Here, of course, the Government's need for civil relief, which involves merely the collection of money, is not as strong as that in *Kordel*, which involved a libel brought by the FDA against certain drugs." 427 F.2d at 580 (footnote omitted).

that the legislative history adduced by the government shows that Congress intended to expand the scope of criminal discovery and usurp the role of the grand jury, by providing the Justice Department with unlimited access to the product of the SEC's civil discovery.[41]

The government's argument derives not from the legislative history of the Securities Act,[42] or the Exchange

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[41] The precise nature of the information-sharing arrangement between the SEC and Justice in this case is unclear. The district court stated: "Although the Justice Department has been granted access to SEC investigatory files, the SEC has assured the court that the materials obtained through civil discovery are not being systematically given to the Justice Department." 453 F.Supp. at 576. However, in a hearing before the district court, an attorney for the SEC stated that there may be a "continuing access request" by the Department of Justice. J.A. 447-48.

In a statement filed with this court after briefing and oral argument, the SEC attempted to clarify further its position on the Justice Department's access to SEC investigatory files:

> We wish to advise the Court that, although on occasion the Commission may find it appropriate to place temporary limitations on access to investigatory files by other law enforcement agencies, it is the Commission's general policy that access to the materials in a particular file, once initially granted, may continue without further Commission authorization. . . .
>
> Nevertheless, in this case, the procedure followed by the Commission is, as the district court was correctly informed, that the Department of Justice will request, if it so desires, to see any additional information obtained by the Commission during the course of its investigation.

Letter from James H. Schropp, Assistant General Counsel, SEC, filed April 5, 1979. *Cf.* SEC v. Gilbert, *supra*, 79 F.R.D. at 685 n.2 ("fruits of the civil discovery have not, 'as a general practice' [citation omitted], been made available to the U.S. Attorney. . . .").

[42] 15 U.S.C. § 77(a), *et seq.* (1976).

Act.[43] Rather, the SEC relies on certain passages from the House and Senate Reports on the Foreign Corrupt Practices Act of 1977 [44] that are said to support the information-sharing arrangement at issue here.[45] In particular, the government points to Congress' endorsement of the "close working relationship between the Justice Department and the SEC" [46] as well as to the Senate Committee's observation: "The Committee expects that close cooperation will develop at the earliest stage of any investigation in order to insure that the evidence needed for a criminal prosecution does not become stale." [47]

This language fails to demonstrate that Congress intended to expand the scope of discovery available to the government in prosecuting criminal violations. On the contrary, the legislative history streses that the Act was meant to preserve the independence and separation of the two agencies, and to maintain the traditional relationship between civil and criminal investigations.[48] At most, the

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[43] 15 U.S.C. § 78(a), *et seq.* (1976).

[44] P.L. 95-213, 91 Stat. 1494. Title I of the Act provides, *inter alia*, for criminal penalties for certain bribes paid by domestic businesses to foreign officials. Title II of the Act, the Domestic and Foreign Investment Improved Disclosure Act of 1977, made certain amendments to the Exchange Act (primarily to § 13) that are not relevant here.

Although the Act vests principal responsibility for enforcing the anti-bribery provisions in the Justice Department, the SEC is given a major role in investigating violations of the Act. *See, e.g.*, HOUSE REPORT, *supra*, at 9; SENATE REPORT, *supra*, at 11-12.

[45] SEC Br. at 28-29.

[46] HOUSE REPORT, *supra*, at 10.

[47] SENATE REPORT, *supra*, at 12.

[48] *See, e.g.*, SENATE REPORT, *supra*, at 11-12:

> When the SEC believes it has compiled enough evidence for a criminal action, it refers the case to the Justice

Reports can be read as an endorsement of "the efficacy of allowing parallel investigations," SEC Br. at 29,[49] a result that is consonant with our conclusion that, at least where the Justice Department has decided to prosecute and has begun presenting its case to the grand jury, it must acquire information from the defendant only through the process of criminal discovery.[50]

> Department for criminal prosecution. This same division of responsibility would also apply with respect to the antibribery provisions of this legislation.

See also id. at 12:

> The SEC's responsibilities would extend to conducting investigations, bringing civil injunctive actions, commencing administrative proceedings if appropriate, defending lawsuits against the Commission . . . and referring cases to the Justice Department *on a timely basis.*

(Emphasis supplied, footnote omitted.) *Accord,* HOUSE REPORT, *supra* (responsibility for the criminal prosecution of violations of the bill rests solely with the Justice Department).

Indeed, the very passage cited by the SEC lends support to our interpretation. Cooperation between the SEC and Justice is consistent with *Kordel* and *LaSalle* while the investigation is undifferentiated in its civil and criminal aspects. It is only after the civil and criminal aspects of a case diverge that it is appropriate to protect a potential criminal defendant from abuse of the civil discovery process.

[49] The legislative history repeatedly underscores the parallel but independent responsibilities of the SEC and the Justice Department under both the Foreign Corrupt Payments Act and the securities laws. *See* HOUSE REPORT, *supra,* at 9-10; SENATE REPORT, *supra,* at 11-12.

[50] Our decision is in accord with SEC v. Gilbert, *supra,* 79 F.R.D. at 687, where the court ordered the SEC "not to furnish the U.S. Attorney specially with any information procured in the course of discovery in this case." The defendant in *Gilbert* had sought a stay of all discovery in the civil enforcement proceeding pending the conclusion of criminal proceedings, which were then at the grand jury stage. *See also* SEC v. Stewart, 476 F.2d 755 (2d Cir. 1973), where

Accordingly, once the Justice Department initiates criminal proceedings by means of a grand jury, the SEC may not provide the Justice Department with the fruits of the Commission's civil discovery gathered after the decision to prosecute. In this way, we respect the need to maintain the integrity of the criminal discovery process and of the grand jury, while permitting the SEC to go

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the Second Circuit refused to issue a writ of mandamus to vacate an order staying discovery in an SEC civil enforcement proceeding. The district court had enjoined the SEC from taking the defendants' depositions so long as the government was unwilling to grant them use immunity for their statements. Although the civil defendants had not yet been indicted, criminal charges were "in the offing." *Id.* at *756*. At least two judges (Mulligan and Timbers) considered the district court's stay erroneous, but Judge Mulligan thought that mandamus was inappropriate to correct the error.

While *Stewart* bears strong similarities to this case, it differs in one important respect. As Judge Mulligan noted in his concurrence, the civil defendants did not seek protection pursuant to the court's broad discretion under Fed.R.Civ.P. 26(c). Rather they sought to compel the government to offer them use immunity without first satisfying the clear procedural and substantive preconditions set forth in 18 U.S.C. §§ 6001-05 (1976). *See* 476 F.2d at 759 (Mulligan, J., concurring). Thus, assuming *arguendo* that the district court was in error in *Stewart*, it does not follow that a protective order under Rule 26(c) would not have been appropriate. Similarly, *Stewart* cannot be read as either endorsing or rejecting the use of civil discovery by the SEC to expand the government's right of criminal discovery.

Indeed, our decision today explicitly avoids the danger feared by the dissent in *Stewart*, namely, that the SEC will be forced "to carry out its statutory duties with at least one hand, and perhaps both, tied behind its back." 476 F.2d at 760 (Timbers, J., dissenting). For our decision permits the SEC to make use of the full range of discovery tools available to it, even during the pendency of the criminal proceedings.

forward with its responsibilities to protect the investing public.[51]

III. Other Issues

Dresser advances a number of additional reasons for denying enforcement of the SEC's subpoena. In our view, these arguments are without merit.

Dresser first argues that the subpoena breaches the SEC's firm assurance not to obtain copies of Dresser's internal records or to take notes from those records. Dresser contends that this commitment is "binding upon and enforceable against" the SEC,[52] citing a number of cases enforcing the government's plea bargaining promises.[53]

We need not decide whether promises such as those allegedly made by the SEC could ever equitably estop the Commission from subpoenaing corporate records as a part of a bona fide investigation. The district court found that no such assurances had been made,[54] and we do not find that determination clearly erroneous.

Dresser argues that, at a minimum, it was entitled to conduct discovery to establish the impropriety of the SEC's subpoena. Specifically, Dresser requests discovery on three issues: 1) whether there was improper intermingling of the investigations conducted by the Justice

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[51] Thus, the "restriction" referred to in the dissent, Dissenting Opinion at 2, is simply that the Justice Department may not substitute *civil discovery* conducted by the Commission after the decision to prosecute for the traditional requirements of *criminal discovery*.

[52] Dresser Br. at 28.

[53] *E.g.*, Santobello v. New York, 404 U.S. 257 (1971); United States v. Minnesota Mining & Mfg. Co., 551 F.2d 1106 (8th Cir. 1977).

[54] 453 F.Supp. at 575.

Department and the SEC; 2) whether the SEC in fact made a commitment of confidentiality to Dresser; and 3) whether the SEC had any bona fide regulatory purpose for subpoenaing Dresser's records.

We recognize that discovery in subpoena enforcement proceedings is available in unusual circumstances,[55] and that at least some of the issues that Dresser would explore through discovery are germane to the enforceability of the subpoena. Recently courts have granted discovery in the wake of *LaSalle* to permit an exploration of the subpoenaing agency's "institutional posture" with respect to possible criminal proceedings.[56]

Nonetheless, in this case, we believe that the district court was correct in denying Dresser's request for discovery. Dresser does not allege that the Justice Department has as yet improperly obtained any documents from the SEC gathered through the civil discovery process. Our order today, prohibiting the SEC from making available the product of its discovery to the Department of Justice, will eliminate any possibility of future abuse. Thus the only ground on which Dresser might continue to assert the impropriety of the subpoena is its contention that there is no proper purpose for the SEC's investigation.

We think the record fails to raise any serious question concerning the propriety of the Commission's duly

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[55] United States v. Fensterwald, 553 F.2d 231 (D.C.Cir. 1977) (IRS summons); United States v. Wright Motor Co., 536 F.2d 1090 (5th Cir. 1976) (same).

[56] *See, e.g.*, United States v. Genser, Nos. 76-2623-24 (3d Cir. March 9, 1979), at 11-12; United States v. Marine Midland Bank of New York, 585 F.2d 36, 39 (2d Cir. 1978) (remanded for filing of affidavits but "[n]o full-dress discovery or trial" to determine IRS's institutional posture).

adopted order of formal inquiry.[57] The Commission's order sets forth with particularity the subject matter of the possible violations that the Commission intended to investigate. Dresser in effect invites us to investigate whether in fact the Commission had any basis for its determination that a violation may have been committed. We do not rule out the possibility that under some circumstances a party under investigation could challenge the sufficiency of the Commission order. But Dresser's allegation that the SEC staff assured the company that no violations have been discovered is insufficient to justify a protracted inquiry into the merits of the SEC's case in the context of a summary subpoena enforcement proceeding.[58]

Dresser next contends that the presence of two SEC attorneys on the Justice Department Task Force demonstrates that the SEC inquiry is not independent of the criminal prosecution, and that this presents an independent ground for permitting discovery. As the Second Circuit's opinion in *United States v. Chemical Bank*, No. 78-6076 (2d Cir., January 17, 1979), makes clear however, the mere fact that representatives from an agency charged with civil enforcement responsibility participate in criminal investigations does not, without more, justify an evidentiary hearing under *LaSalle*. In *Chemical Bank*, the court found sufficient assurance that the IRS agents

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[57] *See, e.g.*, United States v. National State Bank, 454 F.2d 1249, 1252 (7th Cir. 1972) ("mere allegations of improper purpose in issuance of the summons were insufficient to justify the discovery sought in a proceeding of this type [i.e., a summary enforcement proceeding]").

[58] Courts are reluctant to inquire into an agency's jurisdiction in the context of a subpoena enforcement proceeding. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); FTC v. Texaco, Inc., 555 F.2d 862, 871-73 (D.C.Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977).

were not acting as "conduits" to the Justice Department attorneys who direct the Strike Force. Here both the SEC and the Department of Justice have denied that the Commission attorneys involved in the Task Force have any connection with the Dresser matter. *See* SEC Br. at 42. In light of these assurances, Dresser allegations are insufficient to warrant discovery.[59]

Finally, Dresser raises several questions concerning the district court's observations on the company's assertion of attorney-client privilege.[60] In its brief, Dresser states that it does not contend that all the subpoenaed documents are privileged, nor that the investigative report itself is privileged. Since no claim of privilege has been raised concerning specific documents or communications, we have no occasion to decide the extent to which the submission of the report waived any privilege protecting communications related to the subject of the report. Nor do we express any view on the proper standard to be applied in assessing the scope of the privilege.[61]

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[59] *See also* United States v. Dondich, 460 F.Supp. 849, 854 (N.D.Cal. 1978). In *Dondich*, however, the civil enforcement proceedings were completed prior to the SEC attorney's participation in the grand jury proceeding. *See id.* at 850-51.

[60] Specifically, Dresser complains of two rulings: that the company has "failed to show how any specific materials are subject to the privilege"; and, "in reference to the investigative report, [that] disclosure of part of the report waived the privilege, if in fact there was one." 453 F.Supp. at 576. Dresser does not dispute that the investigative report is not privileged, *see* Dresser Br. at 44, but merely wishes to retain its right to assert the privilege with respect to communications that relate to the subject of the report.

[61] Dresser does not seriously press its earlier claim that the subpoena is unduly vague and unreasonable, or that it calls for irrelevant material. The district court rejected those contentions, 453 F.Supp. at 577, and we affirm that ruling.

IV. No. 78-1705—Luter's Application to Intervene in the Enforcement Proceeding

Edward R. Luter, a vice-president of appellant Dresser, applied to the district court for permission to intervene in the subpoena enforcement proceeding on behalf of himself and other Dresser employees pursuant to Fed.R.Civ.P. 24(a)(2). The district court denied the application on June 23, 1978 (J.A. 532) and denied reconsideration on July 23, 1978 (J.A. 559). In its order on reconsideration the district court stated: "Mr. Luter has failed to demonstrate any proper basis for reconsideration, for intervention as a matter of right, or for intervention as a matter of discretion. Even if there was an attorney-client privilege to be invoked in this case, it would be the corporation's and not the employees'. In addition, the employees had no constitutional right of privacy concerning the communications in question." *Id.*

We do not reach the grounds set forth by the district court for denying intervention, for we find that Luter's interests are already adequately represented by the company, at least at this stage of the litigation. As we noted, any claim of privilege with respect to particular documents is premature at this time. Thus, in order to justify intervention now, Luter's interest must differ from the company as that interest relates to resisting the subpoena generally.

This circuit has adopted a liberal approach to intervention under Rule 24(a)(2), when the propriety of granting intervention turns on the extent to which the interest is already represented. The applicant must only show that that representation of his interest *may* be inadequate, and the burden is on those resisting intervention to establish that there is adequate representation. *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 911-13 (D.C.Cir. 1977); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C.Cir. 1967).

Even under this formulation, we find Dresser an adequate representative of its employees. At this stage of the proceedings, the only question is whether the SEC subpoena should be quashed in its entirety. Luter has not suggested any grounds on which he, but not Dresser, would be entitled to that relief. Nor has he suggested that the company is less than fully committed to resisting the subpoena through all available legal channels.

In denying Luter's application at this time, we leave open the possibility that Luter may reapply for intervention to protect any privilege in specific documents that cannot be asserted by the company, or if Luter can otherwise show at a later stage of the proceeding that Dresser is not adequately protecting its employees' interests.

V. Conclusion

Accordingly, we affirm both the order of the district court enforcing the SEC's subpoena and the order denying Luter intervention. However, the order enforcing the subpoena is modified so as to prohibit the SEC from making available to the Justice Department attorneys conducting the grand jury proceedings any documents produced by Dresser pursuant to the subpoena.

So ordered.

AMENDMENT TO PANEL OPINION

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1702

SEPTEMBER TERM, 1979

SECURITIES AND EXCHANGE COMMISSION

v.

DRESSER INDUSTRIES, INC., *Appellant*

And Consolidated Case No. 78-1705

Miscellaneous No. 78-0141
United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 1 1980

GEORGE A. FISHER
Clerk

BEFORE: Bazelon, Senior Circuit Judge; and Bryant*, Chief Judge, United States District Court for the District of Columbia

ORDER

It is ORDERED, by the Court, that the Opinion for the Court filed herein on November 19, 1979, is amended as follows:

On page 28 of the slip opinion, strike the final sentence of the third paragraph and insert in lieu thereof the following:

> However, the order enforcing the subpoena is modified so as to prohibit the SEC from making available to the Justice Department attorneys conducting the grand jury proceedings the fruits of the Commission's discovery pursuant to the subpoena.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ROBB, *Circuit Judge, dissenting in part*: I agree with the court's conclusion that the SEC subpoena must be enforced. I do not agree with the limitation that

> [O]nce the Justice Department initiates criminal proceedings by means of a grand jury, the SEC may not provide the Justice Department with the fruits of the Commission's civil discovery gathered after the decision to prosecute.

In *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) the Supreme Court limited the post-referral summons authority of the Internal Revenue Service because of the possibility that it might be used to broaden the criminal discovery rights of the Department of Jusitce. Unlike the Internal Revenue Service however the Securities and Exchange Commission is an independent agency. Its investigation in this case began and is being conducted in good faith, independently of the Department of Justice. There is no indication that the agency is being used as the cat's-paw of the criminal prosecutors. In these circumstances I would not forbid the SEC to furnish information to the grand jury about the existence of relevant evidence or documents disclosed by the SEC investigation.

The Securities Exchange Act, 15 U.S.C. § 78(u)(d) specifically authorizes the Commission to "transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter." Moreover Congress has recently expressed the expectation that there will be "close cooperation" between the SEC and the Department of Justice in the enforceemnt of the Foreign Corrupt Practices Act of 1977. *See* S. REP. No. 94-114, 95th CONG., 1st SESS. 11-12 (1977); H.R. REP. No. 95-640, 95th CONG., 1st SESS. 10 (1977).

Contrary to this congressional intent the court now restricts cooperation between the Commission and the grand jury. This limitation is not derived from any statute, but is simply judicial legislation. I think it unjustified and accordingly I dissent from this part of the court's opinion.

SECURITIES AND EXCHANGE COMMISSION, Petitioner

v.

DRESSER INDUSTRIES, INC. Respondent.

453 F.Supp. 573

Misc. No. 78-141.

United States District Court, District of Columbia.

June 30, 1978.

[575] MEMORANDUM OPINION AND ORDER

FLANNERY, District Judge.

This matter comes before the court on the SEC's motion for an order requiring obedience to its subpoena *duces tecum* issued to Dresser on April 21, 1978 and Dresser's motion to quash the subpoena. The subpoena was issued in furtherance of an SEC investigation concerning the use of Dresser's corporate funds in connection with questionable foreign payments and the accuracy of Dresser's reporting of these payments in public statements and filings with the Commission. Although there are two issues that need to be explored, it generally can be said that Dresser's objections are without merit.

Dresser alleges that the subpoena should be quashed because: 1) the Commission exceeded its authority; 2) the SEC is breaching its commitments of confidentiality to Dresser; 3) there is impropriety in the simultaneous investigations by the SEC and the Department of Justice; 4) the SEC cannot provide Dresser with adequate assurances of confidentiality; 5) certain documents are protected by the

attorney-client privilege; 6) the subpoena seeks documents that are not relevant to the investigation; and 7) the subpoena is unduly vague and burdensome.

Dresser contends that the SEC has exceeded its authority by violating its regulations. Dresser cites 17 C.F.R. § 202.5 which states that the Commission may order a formal investigation when there is a "likelihood that a violation has been or is about to be committed." Dresser claims that there is no likelihood that a violation has been committed and alleges that the SEC staff has not informed it of any violation. The Commission has issued a formal order of investigation and that is all that is required by the regulation. Despite Dresser's contentions and regardless of the alleged representations by the SEC staff, it is evident that the Commission was of the opinion that there is a likelihood of a violation. *See In the Matter of Dresser Industries, Inc.*, File No. HO-1089 (SEC Order of Apr. 11, 1978). The Commission's determination is entitled to great deference and the court will allow the investigation to proceed.

Dresser's second claim concerning commitments of confidentiality was adequately addressed in its motion for leave to obtain discovery. Throughout the voluntary disclosure program the SEC reserved its rights to pursue a formal investigation and issue subpoenas if necessary. It is readily apparent that the SEC never agreed to completely forego its rights to subpoena the material in question. Furthermore, there is no indication that the SEC has proceeded in bad faith. Finally, Dresser's claim that it has been denied due process is clearly without merit.

Dresser's third ground for objection raises serious claims of impropriety concerning the simultaneous investigations by the SEC and the Department of Justice. Dresser continually asserts that the SEC has referred this matter to the Justice Department for a criminal investigation. If this

in fact occurred, civil discovery by the SEC after a referral for criminal investigation might be improper. See *United States* v. *LaSalle National Bank,* U.S. , -
[576] , 98 S.Ct. 2357, 2362-2368, 57 L.Ed.2d 221 (1978); *Donaldson* v. *United States,* 400 U.S. 517, 536, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971). The SEC, however, has repeated its earlier statement that the two investigations began and are being conducted independently. The SEC did not refer the matter to the Justice Department or recommend that a criminal investigation be opened. Although the Justice Department has been granted access to SEC investigatory files, the SEC has assured the court that the materials obtained through civil discovery are not being systematically given to the Justice Department. Unlike the situation in *United States* v. *LaSalle National Bank,* where the investigation was solely in furtherance of a criminal prosecution, the SEC's subpoena at issue here is in furtherance of a civil investigation. U.S. at , , 98 S.Ct. at 2359, 2363, *see SEC* v. *United Brands Co.,* 1975-76 Fed. Sec.L. Rep. (CCH) ¶ 95,357, at 98,755 (S.D.N.Y. 1975). The fact that a criminal prosecution may still result and that information obtained through this subpoena may be utilized in a criminal proceeding does not render this subpoena unenforceable. *See Donaldson* v. *United States,* 400 U.S. 517, 532-36, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *SEC* v. *United Brands Co.,* CA No. 75-509, 1975-76 Fed. Sec.L. Rep. (CCH) ¶ 95,773 (D.D.C. 1975): Foreign Corrupt Practices Act of 1977, 91 Stat. 1494; S.Rep. No. 114, 95th Cong., 1st Sess. 11-12, *reprinted in* [1977] U.S. Code Cong. & Ad. News, pp. 4098, 4109-10; Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (1976). It appears that the subpoena is perfectly proper because the SEC is pursuing, in good faith, its congressionally-authorized duties. This investigation has a legitimate purpose and the inquiry is relevant to that purpose. *See United States* v. *Powell,* 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964).

Another related issue is the use of SEC attorneys by the Justice Department. Apparently several SEC attorneys have been assigned to the Justice Department to assist in the criminal investigation. The court has been assured that the attorneys assigned to the Justice Department are not involved in the SEC's civil investigation. The court, however, will remind the SEC that strict ethical standards should be maintained in order to avoid the appearance of impropriety.

Dresser's fourth ground for objection is the alleged inadequacies of the SEC's assurances of confidentiality. The SEC has indicated that Dresser will be given the opportunity to proceed administratively to have the material it submits exempted from Freedom of Information Act disclosure. Furthermore, the Commission has offered to give Dresser ten days notice in the event that there is a FOIA request and the SEC determines the material is not exempt and must be disclosed. These assurances of confidentiality are adequate and Dresser is entitled to no more. Dresser has cited no authority for its contention that it is entitled to greater confidentiality than that provided by the Freedom of Information Act. In any event, even if Dresser is entitled to additional protection, it will have the opportunity to obtain such protection when it receives the ten days notice prior to release .

Dresser also contends that the subpoena seeks information protected by the attorney-client privilege. Certainly not all of the material sought is privileged. Dresser's claim of the privilege is vague and conclusory. Dresser has failed to show how any specific materials are subject to the privilege and, particularly, how any materials were generated for the purpose of securing legal advice. *See Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596, 601-02, 609 (8th Cir. 1977); *United States* v. *Upjohn,* Stand.Fed.Tax.Rep.

(CCH) 78-1 U.S. Tax Cas. ¶¶ 9277 at 83,600-603, 9437 at 84,152 (W.D.Mich. April 28, 1978). Additionally, in reference to the investigative report, disclosure of part of the report waived the privilege, if there in fact was one. *United States* v. *Upjohn, supra,* 78-1 U.S. Tax Cas. ¶ 9277, at 83-603; *Burlington Industries* v. *Exxon Corp.,* 65 F.R.D. 26, 46 (D.Md.1974).

[577] Dresser asserts as its sixth objection that the documents sought by the SEC are irrelevant to its investigation. In essence, Dresser contends that it should determine what is material and relevant to the SEC's investigation and Dresser concludes that the information sought is neither material nor relevant. It appears from the SEC's application for an order requiring compliance with its subpoena, however, that the documents sought are reasonably relevant to a proper inquiry. *FTC* v. *Texaco, Inc.,* 180 U.S.App.D.C. 390, 403, n. 23, 555 F.2d 862, 873 n. 23 (en banc), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2939-40, 53 L.Ed.2d 1072 (1977).

Finally, Dresser contends that the subpoena is unduly vague and unreasonably burdensome. In support of its assertions Dresser cites a phrase from the subpoena, taken out of context, and alleges that the phrase could be interpreted to require the production of voluminous materials concerning routine legitimate and lawful expenditures. Dresser also contends that it will be required to produce blueprints, engineering drawings, and other routine business documents. The scope of the subpoena is clear and Dresser's attempts to misinterpret the subpoena so as to make it appear unreasonable will be rejected. The subpoena is not unduly burdensome or unreasonably broad. *See FTC* v. *Texaco, Inc., supra,* 180 U.S.App.D.C. at 410, 555 F.2d at 882. Therefore, the motion to squash the subpoena will be denied and an order entered requiring obedience to the subpoena.

Therefore, in accordance with the memorandum opinion above, upon the application of the Securities and Exchange Commission pursuant to Section 22(b) of the Securities Act of 1933 [15 U.S.C. § 77v(b)], Section 21(c) of the Securities Exchange Act of 1934 [15 U.S.C. § 78u(c)] for an Order requiring the Respondent to appear before duly designated officers of the Securities and Exchange Commission to produce documents in connection with a private investigation *In the Matter of Dresser Industries, Inc.* in accordance with a subpoena duly issued and served by the SEC upon said respondent, and it appearing to the court from the application for an order to require obedience to subpoena, the other papers and documents filed in support thereof, and Dresser's response thereto, that respondent refused to testify and to produce said documents fully and completely as required by said subpoena served upon it without good cause, it is hereby

ORDERED that the Application for an Order to Require Obedience to Subpoena is hereby granted and that the respondent Dresser Industries, Inc. appear and testify and produce documents concerning the matter under investigation, including any and all questionable foreign payments and matters not clearly irrelevant to this investigation, as required by the subpoena issued by the Securities and Exchange Commission. Dresser Industries, Inc. shall appear and so testify and produce upon ten days notice at a place and time designated by the SEC; and it is further

ORDERED that Dresser's motion to quash the SEC's subpoena *duces tecum* be, and the same hereby is, denied.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

I.

—STATUTES—

A.

SECURITIES EXCHANGE ACT OF 1934

15 U.S.C. § 78u, provides:

Investigations and actions

(a) Authority and discretion of Commission to investigate violations

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. . . .

(d) Injunction proceedings

Wherever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

B.

UNITED STATES CODE, TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE

DEPARTMENT OF JUSTICE

28 U.S.C. § 516, provides:

Conduct of litigation reserved to Department of Justice

Expense as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 517, provides:

Interests of United States in pending suits

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 518, provides:

Conduct and argument of cases

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the

United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.S.C. § 519, provides:

Supervision of litgation

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 U.S.C. § 547, provides:

Duties

Except as otherwise provided by law, each United States Attorney, within his district, shall—

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;

(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;

(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and

(5) make such reports as the Attorney General may direct.

C.

INTERNAL REVENUE CODE

26 U.S.C. § 7602, provides:

Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

D.

EXCERPTS FROM LEGISLATIVE HISTORY OF FOREIGN CORRUPT PRACTICES ACT OF 1977

S. Rep. No. 114, 95th Cong., 1st Session 11-12 (1977), provides:

Enforcement responsibilities

After careful consideration the committee concluded that the SEC should continue to have a role in the investigation of violations of the criminal prohibitions as they apply to companies under the jurisdiction of the SEC. The SEC has been the principal agency of the Government taking the lead in the investigation of foreign bribery. This is as it should be for the bribery of foreign officials often violates our securities laws to the extent the payment is not disclosed to investors. The SEC has thus developed considerable expertise in investigation corrupt overseas payments. This same expertise can be put to work in investigating potential violations of the antibribery provisions of this legislation. If this investigative responsibility were to be assigned solely to the Justice Department, as some had advocated, that agency would have to duplicate the investigative capability already in the SEC at a greater cost to the Government.

It should be emphasized that while the SEC investigates potential violations of the securities laws, the only remedy it can bring on its own is an injunctive action. When the SEC believes it has compiled enough evidence for a criminal action, it refers the case to the Justice Department for criminal prosecution. This same division of responsibility would also apply with respect to the antibribery provisions of this legislation.

The committee believes this division of responsibility will result in a stronger enforcement effort compared to an exclusive assignment to the Justice Department. It is often difficult to assemble the degree of evidence required in a criminal action, but enough evidence may exist to enable the SEC to halt a continuation of the corrupt practices through an injunctive action.

The committee expects that close cooperation will develop between the SEC and the Justice Department at the earliest stage of any investigation in order to insure that the evidence needed for a criminal prosecution does not become stale. The arrangements which the committee expects the SEC and Justice to work out on criminal matters is in no way intended to cast doubt upon the authority of the SEC to prosecute and defend its own civil litigation. Under the bill, the Justice Department retains sole investigative and prosecutional jurisdiction over domestic concerns covered but which are not otherwise within the jurisdiction of the SEC.

The committee believes that, by assigning to the SEC enforcement responsibilities for the new prohibition, it will strengthen the Commission's ability to enforce compliance with the existing requirements of the securities laws, and with the new accounting provisions recommended by the Commission and included as section 102 of the bill. Obviously, there may be practical impediments to enforcement in individual cases, just as proof of bribery and other white collar crimes is often difficult to obtain in domestic cases. Nonetheless, the Commission's enforcement efforts under existing U.S. law demonstrate that it is entirely feasible for U.S. agencies successfully to investigate improper foreign payments made on behalf of American corporations.

The SEC's responsibilities would extend to conducting investigations, bringing civil injunctive actions, commencing administrative proceedings if appropriate,[6] defending lawsuits against the Commission and its staff arising out of the Commission's obligations under this Act, and referring cases to the Justice Department for criminal prosecution on a timely basis. The Commission, of course, will retain all of its ex-

[6] For example, rule 2(e) of the Commission's rules of practice; 17 CFR 201.2(e), authorizes the Commission to censure, suspend, or bar professionals, such as accountants and lawyers, from practicing before the Commission. A public or private rule 2(e) proceeding might, in the Commission's view, be preferable, or used in addition to a civil injunctive action or criminal referral, in particular cases.

> isting remedies under the securities laws, and the committee anticipates that the Commission will continue to tailor remedies to fit the circumstances of specific cases.

H.R. Rep. No. 95-640, 95th Cong., 1st Session 9-11 (1977), provides:

SEC enforcement

In the case of companies that currently file reports with the Securities and Exchange Commission, the Committee concluded that the Commission should retain investigative jurisdiction as to the prohibitions against corrupt payments in section 2 of the bill. This has been accomplished by providing that section 2 would amend the Securities Exchange Act of 1934. In the case of domestic concerns not otherwise subject to the Commission's jurisdiction, responsibility for investigating allegations of foreign bribery under this legislation would rest with the Justice Department. In either instance, responsibility for the criminal prosecution of violations of the bill rests solely with the Justice Department.

Since its creation in 1934, the Commission, through its own attorneys, has been solely responsible for the conduct of all civil litigation, both trial and appellate, to which the Commission is a party. This arrangement has been effective and fruitful in insuring the proper discharge of the Commission's statutory mandate to protect the investing public. Accordingly, the committee intends that this arrangement shall not be altered.

The committee found that the SEC was in a far superior position to investigate reporting companies alleged to have bribed foreign officials because of its immediate access to those company's books and Commission filings. Further,

retaining SEC jurisdiction in the case of reporting companies will avoid a costly duplication of effort which would result if enforcement of the antibribery statute were made the sole responsibility of the Justice Department.

Most importantly, the committee recognized the SEC's singular expertise at ferreting out foreign bribery. It was the Commission alone that followed up on the findings of the Watergate Special Prosecution Force in early 1975. On the other hand, it was not until late 1976 that the Justice Department formed a task force to investigate allegations of foreign corporate payments and to review all materials relating to such activities generated by the SEC and congressional committees.

A further reason for vesting investigative jurisdiction in the SEC with respect to section 2 arises from the Commission's well-deserved reputation for independence in its enforcement efforts. The committee would prefer to have investigations such as these, which may be politically sensitive, conducted by an independent agency responsive to Congress rather than the Executive branch.

Finally, the committee believes that, by assigning the SEC enforcement responsibilities with respect to Section 2, it will strengthen the Commission's ability to enforce compliance with the existing requirements of the securities laws. Although there may be practical impediments to enforcement in individual cases, proof of bribery and other white collar crimes is often difficult to obtain in domestic cases. Moreover, the Commission's enforcement efforts under existing law demonstrate that it is possible to investigate succesfully improper foreign payments made on behalf of American corporations.

The SEC's responsibilities would extend to conducting investigations, bringing civil actions, commencing adminis-

trative proceedings if appropriate,[1] defending lawsuits against the Commission and its staff arising out of the Commission's obligations under this Act, and referring cases to the Justice Department for criminal prosecution where warranted, just as the Commission currently does with respect to its existing responsibilities under the federal securities laws. The Commission, of course, will retain the power to seek all of the existing equitable remedies that have been recognized by the courts under the securities laws, and the Committee anticipates that the commission will continue to tailor remedies to fit the circumstances of specific cases.

Traditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee fully expects that this cooperation between the two agencies will continue with respect to the enforcement of the provisions of this bill.

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[1] For example. Rule 2(e) of the Commission's Rules of Practice, 17 CFR 201.2(e), authorizes the Commission to censure, suspend, or bar professionals, such as accountants and lawyers, from practicing before the Commission. A public or private Rule 2(e) proceeding might, in the Commission's view, be preferable, or used in addition to a civil injunctive action or criminal referral, in particular cases.

II.

—RULES—

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(e) provides:

(e) RECORDING AND DISCLOSURE OF PROCEEDINGS.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) GENERAL RULE OF SECRECY. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph ([2]3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(3) EXCEPTIONS.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the gov-

ernment to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) SEALED INDICTMENTS. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Miscellaneous No.

Affidavit of W. Lyall Milde

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

DRESSER INDUSTRIES, INC.,

Respondent.

CITY OF CLEVELAND
STATE OF OHIO } ss:

W. Lyall Milde, being duly sworn, says:

1. I am a partner of the law firm of Squire, Sanders & Dempsey, 1800 Union Commerce Building, Cleveland, Ohio 44115. Our firm is counsel to DRESSER INDUSTRIES, INC. ("DRESSER"), the Dresser Building, 1505 Elm Street, Dallas, Texas. I make this affidavit on the basis of my personal knowledge of meetings held between representatives of DRESSER and members of the staff of the Securities and Exchange Commission ("SEC") that I attended.

2. On January 27, 1976, this affiant, together with Mrs. Lillian Edwards, Corporate Counsel of DRESSER, other outside counsel, and counsel for the underwriter of a public offering of securities of DRESSER, met with representatives of the SEC, including Alan B. Levinson, Director, Division of Corporation Finance, Robert G. Ryan, Division of Enforcement, and others. Barbara N. Brandon, Division of Enforcement, was not present at that meeting.

3. This meeting was requested by counsel for DRESSER to review in generic fashion with the SEC a certain tax payment and a commission arrangement, in order to determine whether it would be necessary for any such matters to be discussed in DRESSER's annual meeting proxy statement, Form 10-K annual report, annual report to shareholders, or registration statement on Form S-7 then about to be filed. Mrs. Edwards described these matters to the staff in generic terms and indicated that DRESSER proposed to file a report on Form 8-K to disclose, also in generic terms, the tax payment described above and DRESSER's intention to examine the propriety of certain other transactions which then appeared to be questionable. The SEC staff suggested that such a report be filed.

4. Following a recess of the meeting during which the SEC representatives conferred separately, the Director of the Division of Corporation Finance stated that the staff did not intend to take the matter to the Commission, although they generally did do so. The Director then stated that the staff wanted a declaration of cessation to be adopted by DRESSER's Board of Directors at its next meeting and a statement of policy adopted against illegal transactions. He also stated the staff had no objection if there was no disclosure of the tax payment in question or other transactions in the annual meeting proxy statement and Form 10-K report and if the disclosure in the S-7 prospectus referred to the tax payment generically.

5. With respect to the period to be covered by DRESSER's investigation, the Director agreed that the fiscal years ended October 31, 1974 and 1975, together with the then current period, would be appropriate, subject to possible expansion with respect to any particular transaction if it appeared that the transaction might also involve earlier periods.

6. The question was raised whether SEC access to company books and records, if requested by the staff, could lead to copies of records and notes appearing in SEC records. The Director of the Division of Corporation Finance replied that the SEC was well aware of the requirements and problems of the Freedom of Information Act and that their policy in the context of the voluntary program was to review books and records but not take copies of documents or notes on them (so that the information is not available under the Act, i.e., without creating the records that could be the subject of a request under the Act). He further stated that if the Company did not cooperate with the voluntary program and a subpoena were required, the Company would have no protection.

7. The commitment to DRESSER referred to above was not limited to an initial review of documents, and no reservation, expressed or implied, was made that the SEC after such initial review of documents had the right to or would request unconditional access to and the right to copy or make notes on the documents.

8. On November 11, 1976, this affiant together with Mrs. Lillian Edwards, Corporate Counsel of DRESSER, and other outside counsel for DRESSER again met with representatives of the SEC, including Robert G. Ryan, Division of Enforcement, and others. Barbara N. Brandon was not present at the meeting. At that meeting the proposed text of a report on Form 8-K discussing the results of DRESSER's special inquiry was discussed with the staff. Certain other transactions which were not deemed pertinent to the Form 8-K report were also disclosed to and discussed with the staff. All such other transactions, moreover, were also discussed in the Management Committee Report to the Audit Committee of DRESSER which was subsequently provided to the SEC. There was no mention made at that meeting concern-

ing staff access to underlying documents. There was no suggestion at that meeting that the SEC could not comply with the prior assurances to DRESSER that no copies of documents or notes would be taken pursuant to any staff access.

/s/ W. LYDALL MILDE

SWORN TO before me and subscribed in my presence this 6th day of June, 1978.

/s/ PAUL BERKOWITZ
Notary Public

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action H-78-405

DRESSER INDUSTRIES, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT OF BARBARA N. BRANDON

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss:

I, BARBARA N. BRANDON, having been duly sworn, depose and say as follows:

1. My name is Barbara N. Brandon and I am employed as an attorney in the Division of Enforcement of the United States Securities and Exchange Commission (the "Commission"). I make this affidavit on the basis of my personal knowledge, acquired during the course of my participation in informal and formal investigations of Dresser Industries, Inc. ("Dresser"), and, where indicated, on the basis of information and belief, based on my review of Commission records and conferences with other members of the Commission's staff.

2. On information and belief, representatives of Dresser met with staff members of the Commission, on or about January 27, 1976, to discuss whether a certain questionable payment, about to be disclosed by Dresser in a Form 8-K,

should be disclosed in a proposed registration statement; and, at that time, Dresser informed the staff that an internal inquiry into such payments had been initiated by Dresser's management. The Commission's staff members informed Dresser that they would want access to any documentation underlying any disclosures Dresser might make relating to questionable payments. The staff agreed to conduct an initial review of such documents on the premises of Dresser's counsel, and that any notes taken at the time would not include the names of individuals or foreign countries. The staff expressly reserved the right to request unconditional access to the documents, pursuant to subpoena or otherwise, if necessary after an initial review.

3. On January 28, 1976, Dresser filed a Form 8-K with the Commission which reported an unreceipted payment of $24,000 by one of its foreign subsidiaries, apparently in connection with the discharge of a tax liability in an unnamed foreign country.

4. On information and belief, representatives of Dresser next met with the staff on or about November 11, 1976, to discuss a proposed report on Dresser's internal inquiry which Dresser intended to file on a Form 8-K that month. The staff commented upon the draft report and other, undisclosed, payments. At that time, the staff formally requested that Dresser allow the staff access to the underlying documents, and to provide a letter to that effect.

5. The report of the internal inquiry, which had been limited by Dresser, to the period beginning November 1, 1973, was filed on a Form 8-K for November 1976. In a generalized manner, Dresser's Form 8-K referred to the following payments:

— $87,900 in facilitating payments to customs employees;

— $25,345 as payments to minor government officials in connection with securing two contracts aggregating $1,228,000;

— $67,233 paid to consultants to other parties, in order to obtain inside bid information in connection with contracts totalling $1,400,000;

—$50,000 paid to employees of private and governmental customers to obtain business;

— $80,000 in commissions paid pursuant to an arrangement which may have facilitated the avoidance by the recipient of local taxes;

— $3,000 paid in connection with customers facilitating payments, allegedly to avoid physical harm to employees, upon approval of Dresser's Management and Audit Committees.

6. Dresser subsequently sent a letter, dated January 12, 1977, a copy of which is annexed hereto as Exhibit A, which stated:

> "Dresser Industries, Inc. undertakes to provide the staff of the Enforcement Division access to its report and supporting documents prepared in connection with the special inquiry described in the above-referenced Form 8-K. We understand that the confidentiality of such information will be preserved with respect to details as to countries and parties subject, of course, to the fact that if a formal inquiry is instituted by the Commission, it will be governed by your usual procedures."

7. The staff of the Commission's Division of Enforcement initiated an informal inquiry into Dresser's questionable payments, as authorized by Commission rule, 17 CFR 202.5. Pursuant to that authority, the staff may request cooperation in providing access to information, but cannot issue subpoenas, or otherwise compel the production of information.

8. The staff requested access to the documents compiled by Dresser in the course of its internal inquiry, pursuant to the terms of Dresser's letter of access. The staff also specifically requested, and received on February 2, 1977, a copy of the "Management Committee Report" to the Audit Committee of Dresser's Board of Directors, describing its internal inquiry. That Report did not identify explicitly any individuals or foreign countries in connection with its description of any questionable payments; but, the Report did include certain payments which had not been disclosed on the Forms 8-K filed with the Commission. No other documents relating to Dresser's internal inquiry have been received from Dresser by the staff; nor, despite Dresser's written undertaking of January 12, 1978 (Exhibit A), has the staff been allowed access to any other such documents by Dresser.

9. On February 14, 1977, Dresser reported an additional questionable payment on a Form 8-K filed with the Commission. That payment involved $1,200,000 in commissions paid to an agent in connection with sales totalling $40,300,000.

10. Dresser responded to the staff's informal requests for access to the underlying documents with a letter, dated July 15, 1977, in which counsel for Dresser stated that the staff would only be provided access to documents from which the names of individuals and foreign countries had been deleted. *See* Complaint, Exhibit B. Dresser stated in that letter that the Commission's decision to release, pursuant to requests made under the Freedom of Information Act ("FOIA"), documents compiled by the staff in the course of other inquiries relating to questionable payments by corporations other than Dresser had "abrogate[d] the understanding upon which" Dresser decided to conduct its internal inquiry. *See In the Matter of Requests of Jerry Landauer and John Berry,* FOIA Release No. 53, 12 *SEC Docket* 278 (Apr. 28, 1977), a copy of which

is annexed as Exhibit B. In that release, the Commission announced its decision to release such documents, on an *ad hoc* basis and with advance notice given to any interested corporations, when there was no longer a continuing law enforcement interest in a particular matter, *and* no exemption from the FOIA would be applicable. The purpose of this release was to set forth some general guidelines with respect to investigatory files relating to questionable payments, not to make a determination with respect to the availability, under the FOIA, of any particular documents.

11. The Commission, in August of 1977, granted the request of the Department of Justice for access to its files on more than 400 corporations which had disclosed questionable payments, including Dresser. On November 21, 1977, the Commission also granted the request of the Department of Justice that no further public release of documents relating to those corporations be made under the FOIA, until the Department of Justice had notified the Commission that release of particular documents or files would not interfere with its law enforcement activities. The Commission issued a release noting this new development. *See In the Matter of Requests For Records Relating to Questionable Or Illegal Corporate Payments,* FOIA Release No. 55, 13 *SEC Docket* 918 (Nov. 21, 1977), a copy of which is annexed as Exhibit C.

12. Dresser continued to refuse to provide the staff with access to unexpurgated documents, even after the staff made a written request on September 9, 1977. *See* letter from Barbara N. Brandon, Division of Enforcement, to David R. Macdonald, counsel to Dresser, dated September 9, 1977, a copy of which is annexed as Exhibit D.

13. On November 18, 1977, the staff again met with representatives of Dresser, at Dresser's request; and, the

staff informed Dresser that it would be provided adequate notice in advance of any proposed public release, pursuant to a request under the FOIA, of documents submitted by it to the staff, and, accordingly, would have ample opportunity to take steps to protect the documents from disclosure. Despite the protections offered by this procedure, Dresser again refused to accede to the staff's request, and submitted a memorandum directly to the Commission, setting forth its views on the matter and arguing against the issuance of a formal order of investigation. Dresser's submission and cover letter, dated November 28, 1977, are attached as Exhibit E.

14. On April 11, 1978, the Commission issued a formal order of private investigation in the matter of Dresser's questionable payments, but instructed the staff to renew its offer initially to review unexpurgated documents on Dresser's premises before issuing a subpoena. Dresser did not agree to that procedure (*see* letter from Baker & McKenzie, dated April 19, 1978, a copy of which is annexed as Exhibit F).

15. On April 21, 1978, a subpoena was issued for the documents in question, returnable May 4, 1978. The subpoenas issued by the staff pursuant to authority delegated by the Commission in its Formal Order of Investigation, are not self-executing. *See,* Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c). Rather, if and when a party declines to comply with a subpoena and the return date expires, the staff will decide whether to recommend that the Commission seek enforcement of its subpoena by a United States District Court. Then, if the Commission so determines, application for enforcement is made to a District Court. If such an application is ever made, Dresser will then have an opportunity to inform the District Court as to any reasons it believes the Court

should not order enforcement of the Commission's subpoena.

16. On April 26, 1978, the staff responded to the concerns reiterated by Dresser in its letter of April 19, 1978 (*see* letter from Marvin Pickholz, Assistant Director, Division of Enforcement, to David R. Macdonald, counsel to Dresser, dated April 26, 1978, a copy of which is annexed as Exhibit G). In that letter, the staff again assured Dresser that, with respect to any information submitted by it to the Commission in the course of this investigation, it would be given reasonable notice of any proposed release, pursuant to the FOIA, and an adequate opportunity to protect the confidentiality of such information. Thus, assuming the Commission were to decide that it was required to release material supplied by Dresser, pursuant to a request under the FOIA, Dresser would be afforded an opportunity at that time to seek judicial relief.

/s/ Barbara N. Brandon
Subscribed to and sworn to before me
this 27th day of April, 1978

/s/
Notary Public
My Commission Expires Dec. 14, 1978

No. 80-354

Supreme Court, U.S.
FILED
OCT 17 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

DRESSER INDUSTRIES, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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SECURITIES AND EXCHANGE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission may obtain information pursuant to an administrative subpoena even though the recipient of the subpoena is also the subject of a federal grand jury investigation.

2. Whether a grand jury may obtain from the Securities and Exchange Commission information the Commission has gathered during its independent administrative investigation.

3. Whether the finding of the district court, affirmed by the court of appeals, that the Commission never agreed completely to forego its right to subpoena documents as part of its investigation, was clearly erroneous.

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Miscellaneous:

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S. Rep. No. 95-114, 95th Cong., 1st Sess. (1977) 7

OPINIONS BELOW

Neither the opinion of the en banc court of appeals (Pet. App. A) nor the prior opinion of the panel (Pet. App. B) is reported. The opinion of the district court (Pet. App. C) is reported at 453 F. Supp. 573.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1980. The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The statutes and rules involved appear in Pet. App. D and the appendix attached to this brief.

STATEMENT

In January 1976, petitioner Dresser Industries, Inc., a domestic corporation that also does business overseas, became a participant in a Securities and Exchange Commission program under which it agreed voluntarily to provide information concerning questionable foreign payments. In the fall of that year, the Department of Justice established a task force to investigate possible criminal violations by domestic corporations arising from such payments. In August 1977, at the request of the Department of Justice, the Commission made its files available to the task force attorneys. Those files contained documents concerning more than four hundred corporations, including petitioner.

In January 1978, a grand jury sitting in the District of Columbia commenced an investigation into petitioner's overseas payments and issued a subpoena to petitioner for production of documents. In April 1978, the Commission independently determined to commence an investigation into the adequacy of petitioner's disclosure of these

payments in accordance with the requirements of the federal securities laws, and it issued an administrative subpoena to petitioner covering some of the same documents.[1]

When petitioner failed to respond to the Commission's subpoena, the Commission applied to the United States District Court for the District of Columbia for enforcement. Petitioner opposed enforcement of the subpoena, contending, *inter alia,* that the Commission's subpoena exceeded its authority, that the Commission had breached prior commitments concerning the confidentiality of the materials involved, and that simultaneous Commission and grand jury investigations were improper. The district court rejected these contentions and enforced the subpoena. *SEC* v. *Dresser Industries, Inc.,* 453 F. Supp. 573 (D.D.C. 1978) (Pet. App. C).

On appeal, a panel of the court of appeals unanimously affirmed the district court's order enforcing the Commission's subpoena. However, with one judge dissenting from that part of the opinion, the panel *sua sponte* modified the district court's order and prohibited the Commission "from making available to the Justice Department attorneys conducting the grand jury proceedings the fruits of the Commission's discovery pursuant to the subpoena" (Pet. App. B-28 to B-29).

On petition by the Commission, joined by the United States as intervenor, the court of appeals vacated the panel opinion and granted rehearing en banc (Pet. App. A-3). By unanimous vote, the en banc court affirmed the

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[1] The Securities and Exchange Commission has not yet completed its investigation and has made no formal reference of this case to the Department of Justice.

district court order enforcing the subpoena and rejected the modification imposed by the panel majority (Pet. App. A-34). Noting that "there is no support for the panel's modification in either the relevant statutes or legislative history" (Pet. App. A-35), the court held that, after the Commission begins a lawful investigation, it may "transmit such evidence as may be available concerning * * * [violations] * * * to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings" (*id.* at A-15 to A-16, quoting 15 U.S.C. 78u(d)). The court also held that the Commission, after turning over such materials, may continue to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision" of the federal securities law (Pet. App. A-15 to A-16, quoting 15 U.S.C. 78u(a)). The court concluded that the Commission's exercise of its authority did not infringe the secrecy of the grand jury's proceedings (Pet. App. A-30 to A-32); rather, it helped to insure that the grand jury would receive all relevant evidence (*id.* at A-39 to A-40). The court also rejected the contention that the policy considerations pertaining to the statutory summons authority of the Internal Revenue Service found controlling in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), were relevant here, since "the SEC's authority to issue the subpoena remains undiminished after the start of a grand jury investigation" (Pet. App. A-23 to A-25).

ARGUMENT

The court of appeals, sitting en banc, unanimously held that it was proper for the Commission to furnish, and the grand jury to receive through the Department of Justice, relevant information that the Commission has gathered in its independent civil investigation. The decision of the court of appeals is consistent with principles previously

endorsed by this Court and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. This Court repeatedly has recognized that an administrative agency may conduct investigations into conduct that also is being examined by a grand jury. It also has recognized that the fruits of such investigations may be provided to the Department of Justice when the agency investigation is not employed solely as a device for gathering evidence for a criminal prosecution. *United States* v. *Kordel*, 397 U.S. 1, 11-12 (1970); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 51-52 (1912).

There is no merit to petitioner's contention (Pet. 7-10), that application of these principles in this case is inconsistent with *United States* v. *LaSalle National Bank*, *supra*, or *Donaldson* v. *United States*, 400 U.S. 517 (1971). To the contrary, both of those decisions support the reasoning of the court below. In *LaSalle National Bank*, this Court reversed a decision of the court of appeals that had refused to enforce an IRS summons because the motivation of the individual agent conducting the case was to gather evidence for a prospective recommendation for criminal prosecution. This Court held that the prophylactic rule of *Donaldson* (preventing use of an IRS summons following an IRS recommendation for criminal enforcement) should apply only after the IRS has determined institutionally to recommend criminal prosecution. The decision in *LaSalle* did not rest on constitutional considerations; the case involved only the construction of IRS statutes.

The limited powers of the IRS after referring a case to the Department of Justice stand in sharp contrast to the powers of the Securities and Exchange Commission to pursue its own investigation and seek appropriate civil relief. Institution of criminal tax proceedings shifts from the IRS to the Department of Justice control over future compromises of civil tax liability. *United States* v. *LaSalle National Bank, supra,* 437 U.S. at 312. By contrast, the pendency of criminal charges or the existence of a grand jury investigation does not limit the Commission's control over its independent proceedings for civil administrative or judicial relief. Thus, the Commission retains authority to investigate and seek a civil remedy regardless of what the Department of Justice decides to do with respect to a possible criminal reference. See Pet. App. A-11 to A-34. So long as the Commission is seeking evidence to fulfill its own statutory responsibilities, there is no abuse of its administrative process. 437 U.S. at 311-316.

For similar reasons, petitioner's reliance on *Donaldson* v. *United States, supra,* also is unavailing. In *Donaldson,* this Court recognized that information gathered by the IRS with a summons issued under 26 U.S.C. 7602 could be used in a criminal prosecution. The Court noted that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (400 U.S. at 535), and it pointed out that during the pre-referral stages of an investigation, the IRS may utilize its summons power as long as the summons is "issued in good faith and prior to a recommendation for criminal prosecution" (*id.* at 536). The Court also indicated that an IRS summons is not properly employed following a "recommendation for criminal prosecution" (*ibid.*), but that determination rested on the assumption of complete

responsibility for the case in both its criminal and civil aspects by the Department of Justice. By contrast, there is no comparable relinquishment of the Commission's authority over the civil aspects of a case when the grand jury begins its investigation (Pet. App. A-18 to A-34).[2]

The Commission's authority to conduct such investigations and to seek enforcement of its subpoena in federal court is explicit,[3] as is its authority to institute civil proceedings to enforce the federal securities laws. In addition, the Commission may transmit "such evidence as may be available" to the Attorney General for use in criminal investigations. See Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b); Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d). The statutes impose no limits on the transmittal of information; nor do they specify a temporal or functional cut-off point.[4]

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[2]This Court granted certiorari in both *Donaldson* and *LaSalle* because of a continuing disagreement among the circuits as to the enforcement responsibilities of the IRS. See 400 U.S. at 522; 437 U.S. at 305. By contrast, no court of appeals has adopted a position at variance with that of the D.C. Circuit in this case. Petitioner's claim (Pet. 6) that the decision of the court of appeals may apply in other statutory contexts is not a basis for granting review. The opinion below rested on the court's careful analysis of the statutory scheme that is relevant in this case. Whether the court's reasoning would apply under other statutes will depend on the nature of the investigatory authority that those statutes confer.

[3]See Sections 19(b), 20(a), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), 77t(a), and 77v(b). See also Section 21(a)-(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)-(c). The agency's powers of investigation are comparable to those of a grand jury that may investigate on the basis of suspicion that the law has been violated. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643, 652 (1950).

[4]Close cooperation between the Department of Justice and the Securities and Exchange Commission is also central to the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, which provides criminal penalties for bribery of foreign officials by

2. Petitioner also argues (Pet. 12-14) that the decision below improperly expands the scope of information presented to the grand jury and permits the prosecutor to "infringe" on its functions.

This line of argument ignores the established legal principle that the "grand jury's sources of information are widely drawn." *United States* v. *Calandra,* 414 U.S. 338, 344 (1974). The grand jury may consider evidence from all sources, including any evidence transmitted to the Department of Justice by the Commission. See *Branzburg* v. *Hayes,* 408 U.S. 665, 670 (1972):

> A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." * * * Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.

Of course, the Department of Justice attorney who presents evidence to the grand jury is the prime mover of the inquest. See, *e.g., Bacon* v. *United States,* 449 F. 2d 933, 943 (9th Cir. 1971).[5] Transmittal of relevant evidence

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United States corporations. Congress specifically contemplated a "close working relationship between the Justice Department and the SEC" in investigating questionable foreign payments. See H.R. Rep. No. 95-640, 95th Cong., 1st Sess. 10 (1977); S. Rep. No. 95-114, 95th Cong., 1st Sess. 11-12 (1977). Congress believed that the Commission's expertise would be of substantial assistance to the Department of Justice in pursuing such cases. H.R. Rep. No. 95-640, *supra,* at 9; S. Rep. No. 95-114, *supra,* at 11; see also *United States* v. *Fields,* 592 F. 2d 638, 646 (2d Cir.), cert. denied, 442 U.S. 917 (1979). The court of appeals' application of the rule in *United States* v. *Kordel, supra,* is essential in serving this important statutory purpose.

[5]Petitioner's reliance (Pet. 13) on *In re Melvin,* 546 F. 2d 1 (1st Cir. 1976), is misplaced completely. That case reversed a district court order to a suspect requiring him to appear in a line-up when no grand

to the Department of Justice for presentation to the grand jury plainly assists, rather than undermines, the grand jury's function. Nor can this process be conceived as an expansion of the grand jury's purview. As the court of appeals correctly observed (Pet. App. A-26), the grand jury's own investigative powers are at least as broad as those of the Commission.[6]

3. Petitioner also claims (Pet. 14-17) that the Commission lacks the authority to commence a civil enforcement proceeding in the face of a parallel grand jury investigation. When considered in light of the principles discussed above, petitioner's claim is frivolous.

Moreover, the Commission's authority to investigate possible civil and criminal violations of the federal securities laws, and to seek enforcement of its subpoenas, is independent of its authority thereafter to commence an action in federal district court to enjoin further violations

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jury subpoena had been issued. The court of appeals concluded that the order was not in aid of the grand jury and had no legal basis. In contrast, the subpoena of the Commission in this case rested on explicit statutory authority, and the transmittal of information from the Commission to the Department of Justice was a matter of cooperative law enforcement. It was not, as petitioner suggests (Pet. 12), "coercive discovery" directed against another agency.

[6]In *LaSalle,* this Court remarked that an IRS summons should not be used to "broaden the Justice Department's right of criminal litigation discovery." 437 U.S. at 312. We do not understand this reference to mean, however, that transmittal of relevant information to the grand jury by the prosecutor in cooperation with another law enforcement agency is in derogation of post-indictment discovery procedures. Prior to indictment, the grand jury exercises broad powers of inquisition. *United States* v. *Calandra, supra.* The rules of criminal discovery (and their attendant restrictions) do not come into play until charges are returned by indictment or information. *Post* v. *United States,* 161 U.S. 583, 587 (1896); *Kirby* v. *Illinois,* 406 U.S. 682, 688-690 (1972); Fed. R. Crim. P. 16.

of law or take other remedial action.[7] Until the Commission receives and considers all available evidence pursuant to that fact-finding process, no decision is ordinarily made regarding what, if any, administrative or civil enforcement action will be taken.

Should the Commission decide to initiate an enforcement action in the future, there is no ground for doubting its authority. The Commission's authority to conduct civil litigation on its own behalf in federal court has been upheld since its formation. See *SEC* v. *Robert Collier & Co.*, 76 F. 2d 939 (2d Cir. 1935); *Jones* v. *Kennedy*, 121 F. 2d 40, 45 (D.C. Cir.), cert. denied, 314 U.S. 665 (1941). See also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).

Nor are petitioner's arguments advanced by *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976), which held that law enforcement powers could not be vested in the Federal Elections Commission, a government body whose appointees were selected and controlled by Congress. The Securities and Exchange Commission, in contrast, is an independent administrative agency whose members are appointed by the President with the advice and consent of the Senate, in conformity with Article II of the Constitution. See 15 U.S.C. 78d. The fact that the Commission, but for appointments, remains generally independent of the Executive Branch does not diminish its authority. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 132-136; *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935).

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[7]Compare Sections 19(a), (b), and 20(c) of the Securities Act of 1933, 15 U.S.C. 77s(a), (b), and 77t(c), and Section 21(a)-(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)-(c), with Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b), and Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(b).

4. Petitioner further contends (Pet. 17-18) that the court of appeals' decision permits "unregulated sharing of grand jury investigatory information between the Justice Department and the SEC for the purpose of furthering the SEC's civil investigation." This, petitioner asserts, constitutes an "unprecedented breach of grand jury secrecy" in violation of Fed. R. Crim. P. 6(e).

Petitioner's contention has no bearing on the issues in the present case. The issues here are, first, whether the Commission is entitled to enforcement of its subpoena and, second, whether the Commission should be barred from transmitting to the Department of Justice any materials so received.[8] No evidence exists that the Commission sought disclosure of any information from the grand jury nor does the opinion below suggest that it could do so other than as provided by law.[9]

The cases cited (Pet. 19) by petitioner (*In re Perlin*, 589 F. 2d 260 (7th Cir. 1978), and *United States* v. *Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978)) concern participation by agency representatives before the grand jury or

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[8]As to the latter proposition, it is obvious that the transmission of materials from the Commission to the Department for possible use by the grand jury could not possibly constitute a disclosure of "matters occurring before the grand jury" in violation of Fed. R. Crim. P. 6(e), since the transmission would precede any grand jury proceedings relating to the documents transmitted. And as to the former, it is similarly difficult to see how the production of documents by petitioner to the Commission has the slightest relationship to the secrecy of proceedings before the grand jury.

[9]The Commission's subpoena did not require disclosure of the nature of the materials that are before the grand jury. The subpoena requested certain categories of documents directly from petitioner, without regard to whether they have been requested by the grand jury (Pet. App. A-30). Petitioner itself chose to identify the documents that were sought by the Commission as encompassing those submitted to the grand jury (Pet. 3).

disclosure of matters occurring before the grand jury to an agency. As the instant case is wholly concerned with the flow of information from petitioner to the Commission, and then perhaps to the grand jury, petitioner's arguments and authorities are wholly inapposite.

5. Finally, petitioner argues (Pet. 21-23) that the Commission has failed to honor an agreement to examine petitioner's documents without first making copies or taking notes identifying individual persons or countries described in the documents.

However, petitioner has not challenged the factual finding of the district court, upheld by the court of appeals, that the Commission never agreed to forego completely its right to subpoena the materials in question (see Pet. App. C-2). Moreover, it was petitioner, not the Commission, who breached the agreement, since petitioner refused to provide access to unexpurgated copies of its documents (Pet. App. F-5 to F-6). These circumstances caused the Commission to commence a formal investigation and to utilize compulsory process. Neither petitioner's compliance with the grand jury's subpoena, nor its past willingness to volunteer certain limited information to the Commission, immunize it from further lawful investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

DOJ-1980-10

APPENDIX

Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), provides:

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), provides:

> Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), provides:

> In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person

guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c), provides:

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor

and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

Section 4 of the Securities Exchange Act of 1934, 15 U.S.C. 78d, provides:

> (a) There is hereby established a Securities and Exchange Commission (hereinafter referred to as the "Commission") to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable. No commissioner shall engage in any other business, vocation, or employment than that of serving as commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this chapter. Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (1) any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (2) the terms of office of the commissioners first taking office after June 6, 1934, shall expire as designated by the President at the time of nomination, one at the end of one year,

one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years, after June 6, 1934.

(b) The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and other experts as may be necessary for carrying out its functions under this chapter, and the Commission may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

Supreme Court, U. S.
FILED
OCT 31 1980

No. 80-354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF THE PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1980

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Intervenor.

REPLY BRIEF OF THE PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

This reply brief principally addresses those portions of the government's responding brief that either fundamentally mischaracterize the opinion of the Court of Appeals below or attempt to retract positions previously taken by the government.

A. Conflict with *LaSalle*

In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court reviewed the statutory scheme that governs the summons authority of the IRS. It concluded that even after referring a matter to the Justice Department, "logically . . . the IRS could use its summons authority under § 7602 to uncover information about the tax liability created by a fraud regardless of the status of the criminal case". 437 U.S. at 312. But this Court went on to

explain that post-referral use of the summons authority was objectionable because it would "broaden the Justice Department's right of criminal litigation discovery [and] infringe on the role of the grand jury as a principal tool of criminal accusation." *Id.*

The Court of Appeals below declined even to ponder the import of these policy interests to this case.[1] The government attempts to mask this refusal by misrepresenting the Court of Appeals decision.

Thus, the government opens its argument (Respondent's Brief, hereinafter "Res. Br.", 3) by alleging that the Court of Appeals "held that it was proper for the Commission to furnish, *and the grand jury to receive through the Department of Justice,* relevant information that the Commission *has gathered* in its independent investigation." (Emphasis added.) That is not what the Court of Appeals decision held. The Court of Appeals decision authorizes the SEC to subpoena *additional information* during the grand jury investigation, not merely to share information that it has already gathered. (*See* Court of Appeal's Opinion, Petitioner's Appendix, hereinafter "Pet. App." A-34.) In addition, the Court of Appeals decision authorizes the SEC then to share this information with the *Justice Department,* not the grand jury. (*See* Pet. App. A34-A40.)

The government attempts to blur this issue by dwelling on the discovery powers of the grand jury. This misleading emphasis diverts attention from the critical principle here: The Justice Department does not have independent

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[1] Pet. App. A-25:

> In the case of an SEC investigation there is no call for a 'prophylactic rule,' and thus no need to ponder the import of these 'policy interests,' because the SEC's authority to issue the subpoena remains undiminished after the start of a grand jury investigation.

discovery powers. The gravamen of Dresser's objection is that the Justice Department cannot make use of the SEC's subpoena authority. Consistent with *LaSalle,* the First Circuit in *In re Melvin,* 546 F.2d 1, 5 (1st Cir. 1976), recognized that the Justice Department may only conduct discovery through the grand jury. The Court of Appeals decision would confer an independent right of discovery on the Justice Department. It is no more appropriate for the Justice Department to make independent use of the SEC's compulsory powers in the present case than it was for the Department to make such use of the District Court's compulsory powers in *Melvin.*

The Court of Appeals decision thus allows the Justice Department to conduct criminal discovery through another agency's subpoena powers, thereby broadening the Justice Department's (not the grand jury's) right of criminal litigation discovery and infringing on the role of the grand jury as a principal tool of criminal accusation.

The government also seeks to rely upon an allegedly distinctive feature of the SEC statutes, namely the agency's explicit authority to turn over "such evidence *as may be available* concerning such acts or practices as may constitute a violation of any provision of this chapter . . . to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter." 15 U.S.C. §78u(d). (Emphasis added.)[3] The very phrasing of the provision, however, clearly indicates that it refers to information

[3] The term "criminal proceedings" as used in the context of 15 U.S.C. § 78u(d) includes grand jury proceedings. *See* Fed. R. Crim. P. 1, incorporating Fed. R. Crim. P. 6; concurring opinion of Judge Timbers in *United States* v. *Griesa,* 481 F.2d 276, 285 (2d Cir. 1973)

available *at the time of the referral.* It is in no way inconsistent with the *LaSalle* rule and bears no resemblance whatever to the authority here claimed by the SEC. The IRS had in *LaSalle,* as the SEC has in the present case, prima facie statutory authority to conduct the investigation in question. But this Court held that, once a criminal referral is made, such prima facie statutory authority must yield before the higher interests of controlled criminal litigation discovery and grand jury integrity.

Dresser believes that its overseas employees are entitled to nothing less than a grand jury investigation—an investigation conducted by and through the grand jury, with the full secrecy provisions of Fed. R. Crim. P. 6(e), (hereinafter "Rule 6(e)") and other traditional safeguards. This can only be accomplished by preventing the Justice Department from bypassing the grand jury and, with the SEC, prepackaging an investigation for the grand jury's rubberstamp. Only a lawful, properly conducted grand jury investigation can serve as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States* v. *Dionisio,* 410 U.S. 1, 17 (1973).

B. Disclosure of Matters Occurring in the Grand Jury

The government also denies, incorrectly, that the Court of Appeals opinion permits disclosure of matters occurring before the grand jury to the SEC. The Court of Appeals, using the legislative history of the Foreign Corrupt Practices Act as authority, concluded that a "close working relationship" between the grand jury/Justice Department

investigation and the SEC civil investigation of Dresser is appropriate. It reasoned that

> [s]ince such a "close working relationship" will govern the activities of the agencies in enforcing the laws against questionable foreign payments under the new statute, it would be impractical for us to attempt to screen the agencies from each other when they are investigating the same sort of offense under the former statutes. Pet. App. A-37.

The right to a "close working relationship" and a sharing of information during a grand jury investigation was successfully urged upon the Court of Appeals by both the SEC and the Justice Department, because each agency wished to avoid the restrictions placed upon them by the panel decision. *See* SEC Petition for Rehearing, 2 ("it is critical . . . that the Commission and the Justice Department be able to cooperate and exchange information . . ."); Justice Department Brief for Rehearing en banc, 17 ("Congress encouraged a 'close working relationship between the Justice Department and the SEC' in investigating questionable foreign payments . . ."). Neither agency acknowledged before the Court of Appeals that such cooperation and sharing of information must take place within Rule 6(e) in order to prevent unauthorized disclosure to the SEC of matters occurring before the grand jury.

The Court of Appeals failed to appreciate, therefore, that the authorization to share grand jury information with a civil agency must be subject to Rule 6(e), although Dresser had specifically pressed this issue. As a result, the

Court of Appeals authorized this close working relationship without Rule 6(e) protection, thereby enabling the government to play fast and loose with the rights of persons under investigation by a grand jury. This result is in conflict with the decisions in *In re Perlin,* 589 F.2d 260 (7th Cir. 1978), in *United States* v. *Birdman,* 602 F.2d 547 (3rd Cir. 1979) *cert. denied,* 444 U.S. 1032 (1980), and in *United States* v. *Dondich,* 460 F. Supp. 849 (N.D. Cal. 1978).

This point has finally been recognized by the government. Rather than admit that the portion of the Court of Appeals' opinion captioned "Cooperation Between SEC and Justice" (Pet. App. A34-40) is in error, the government now claims that this issue is not before this Court. The error is central to this case. The need for a "close working relationship" was the fundamental rationale for the Court of Appeals' rejection of both the prophylactic *LaSalle* rule and the protective order provided by the panel's opinion. Dresser may never have another opportunity to prevent unauthorized disclosure of grand jury matters to the SEC. The issue, therefore, is properly before this Court.

C. The Post-reference Status of This Case

The government's statement of the case (*See,* e.g., Res. Br. 1-2 and n.1) also creates the impression that this case is still in the pre-referral stage, and that it is mere happenstance that the grand jury and the SEC are both investigating the same parties under the same laws at the same time. In the Court of Appeals, however, the government expressly admitted that the SEC referred the *Dresser* case to the Justice Department for investigation of possible securities violations.[4] Thus, two cases cited by the govern-

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[4] The Brief for the United States on Rehearing En Banc states at 15, n. 13:

> The panel majority correctly observed that: "[t]he reference made in this case was 'informal,' i.e., the

(Footnote continued on next page.)

ment as authorizing enforcement of civil subpoenas, *United States* v. *Kordel*, 397 U.S. 1 (1970) and *United States* v. *Fields*, 592 F.2d 638 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979), are inapposite because those cases deal only with pre-referral enforcement of a civil subpoena.[5]

D. The SEC Confidentiality Agreement

In order to avoid complying with its obligations under the confidentiality agreement entered into between the SEC and Dresser, the government now claims (Res. Br. 11) that Dresser itself breached the agreement. Dresser is and has always been prepared to try this issue at the appropriate time. It has not yet been allowed to do so. The Court of Appeals disposed of this branch of the case on the ground that the SEC "never agreed to forego completely its right to subpoena the materials in question." (Pet. App. A-41.) Dresser concedes that the SEC did not forego that right, but asserts that the SEC promised not to exercise the right *until* it had first examined the materials on a confidential basis, and determined if there were any need for further investigation.

(Footnote continued from preceding page.)

SEC made its investigating files available to the Justice Department pursuant to an order of the SEC, but the reference was not accompanied by a recommendation for prosecution. See *SEC* v. *United Brands Co.*, Fed. Sec.L.Rep. (CCH) ¶ 95,263 (D.D.C. July 18, 1975) (SEC decision to make files available to Justice Department equivalent to a 'reference' under the Exchange Act.)"

[5] The only other case relied upon by the government in this area is *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U.S. 20 (1912). *Standard Sanitary* involved simultaneous enforcement proceedings in which the government was not seeking civil discovery. The points at issue in this case were never considered.

Dresser was confident that such an evaluation would result in termination of the matter at that stage. It was this commitment—to protect Dresser's overseas employees by first confidentially examining and evaluating the materials—that induced Dresser to conduct the internal investigation. The legal issue involved here, therefore, is not that defined by the Court of Appeals, but rather whether the SEC will be held to the pre-subpoena confidentiality procedure that it promised in order to induce Dresser's inquiry.

Respectfully submitted,

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